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v.
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for the Fourth Circuit

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88-938

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1	Dec 5 1988	G	Petition for writ of certiorari filed.
3	Dec 28 1988		Order extending time to file response to petition until February 5, 1989.
4	Feb 2 1989		Order further extending time to file response to petition until February 28, 1989.
5	Mar 1 1989		Order further extending time to file response to petition until March 10, 1989.
6	Mar 10 1989		Brief of respondent United States in opposition filed. VIDED.
7	Mar 15 1989		DISTRIBUTED. March 31, 1989
8	Mar 20 1989	X	Reply brief of petitioners Crandon, et al. filed.
9	Apr 3 1989		Petition GRANTED. The case is consolidated with 88-938, and a total of one hour is allotted for oral argument. **********
10	Apr 13 1989		DEFERRED APPENDIX agreed by the parties.
12	Apr 25 1989		Order extending time to file brief of petitioner on the merits until June 9, 1989.
13	May 8 1989		Record filed.
		*	Certified copy of original record and proceedings, 12 volumes, received. (Box).
14	Jun 9 1989		Brief of petitioners Crandon, et al. (TBP) filed.
16	Jul 5 1989		Order extending time to file brief of respondent on the merits until August 4, 1989.
17	Aug 4 1989		Brief of respondent United States (TBP) in opposition filed. VIDED.
18	Aug 21 1989		Joint appendix filed. VIDED.
22	Aug 28 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1989. (1ST CASE)
19	Aug 30 1989		Brief of petitioners Crandon, et al. filed. VIDED.
20	Aug 30 1989		Brief of respondent filed. VIDED.
21	Sep 1 1989		Reply brief of petitioners Crandon, et al. filed.
23	Sep 8 1989	G	Motion of petitioners for divided argument filed.
24	Sep 13 1989		CIRCULATED.
25	Oct 2 1989		Motion of petitioners for divided argument GRANTED.
26	Nov 6 1989		ARGUED.
27	Nov 8 1989		OLC documents submitted by the Solicitor General at the request of the Court.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-931
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LAWRENCE H. CRANDON, THOMAS K. JONES,
HAROLD KITSON, JR., MELVYN R. PAISLEY,
and HERBERT A. REYNOLDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Following the Fourth Circuit's denial of rehearing *en banc* by a 6-5 vote, petitioners present the following questions to this Court concerning the criminal and ethical standards governing acceptance of appointments to important government posts:

1. Does 18 U.S.C. § 209, which prohibits the payment or receipt of any "supplementation of salary" paid as "compensation for . . . services as an officer or employee of the executive branch of the United States," impose civil and criminal liability on a private employer who pays a fixed, irrevocable severance payment to its departing employee who subsequently accepts federal employment, as well as on the employee who receives that payment?

2. When a new federal employee makes timely disclosure to the employee's superiors, to designated agency ethics officials and in government forms completed in compliance with the government's instructions, of receipt of a severance payment from his former employer, does the disclosure negate any potential "conflict of interest" (and thus any potential liability under 18 U.S.C. § 209) resulting from receiving or retaining the severance payment?

3. Did the Fourth Circuit again overstep an appellate court's limited power to substitute its view of the facts, in contravention of this Court's holding in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and similar cases, when

   (a) the appellate court assumed that the individual recipients of severance payments had intended to receive the payments as "compensation for government service," even though (i) the district court had specifically found, after a full trial, that the

individuals lacked such intent, and (ii) the court of appeals did not overturn that finding as "clearly erroneous" or even address the individuals' intent in accepting the payments; and

(b) the appellate court found, based on its own assessment of the evidence, that the corporate employer had intended to pay the severance payments as "compensation for government service," even though the district court had specifically found, after a full trial, that the employer did *not* have that requisite intent?

LIST OF PARTIES

The defendants in the district court and appellees in the court of appeals were The Boeing Company (which is filing a separate petition for a writ of certiorari) and petitioners Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds.

The United States was the plaintiff in the district court and the appellant in the court of appeals.

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IN THE

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LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 5, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 845 F.2d 476, and is reprinted in Appendix A to this Petition ("App."). The opinion of the District Court for the Eastern District of Virginia is reported at 653 F. Supp. 1381, and is reprinted in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. (App. 28a.) On September 7, 1988, the court denied a timely petition for rehearing (by a 2-1 vote) and also denied a suggestion for rehearing *en banc* (by a 6-5 vote). (App. 29a.) This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 209 provides in pertinent part:

> (a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioners are five former employees of The Boeing Company who left the employ of that company and accepted senior government positions with the Defense Department. Alleging an implied cause of action under a criminal statute, 18 U.S.C. § 209, and common law principles of "fiduciary loyalty," the Justice Department brought this civil action against Boeing and the petitioners seeking to recover severance payments that Boeing had made to the petitioners before they entered federal service. The government relied on Section 209, which makes it a crime for a federal official knowingly to accept a "supplementation of salary, as compensation for . . . services as an officer or employee" of the government.

After trial, the district court rejected the government's theories on both the facts and the law, but a divided panel of the Fourth Circuit reversed.

1. Recruitment, Receipt Of Severance Payments, And Subsequent Public Service

In 1981 and 1982, the Defense Department actively recruited four senior Boeing employees for high-level positions in the Department:

T. K. Jones—
Deputy Under Secretary of Defense
for Strategic and Theater Nuclear Forces

Harold Kitson—
Deputy Assistant Secretary of the Navy for
Command, Control, Communications and Intelligence

Melvyn R. Paisley—
Assistant Secretary of the Navy
for Research, Engineering and Systems

Herbert A. Reynolds—
Deputy Director of Space and Intelligence Policy,
Office of the Undersecretary of Defense for Policy.

A fifth senior Boeing employee—petitioner Lawrence H. Crandon—was recruited for a position as a NATO air defense scientist in Europe. Each man agreed to become a candidate for the proposed government position. (App. 17a-18a, ¶¶ 9-14. *See also* JA 331-332, ¶¶ 17-24; 340, ¶ 113 (Jones); 333, ¶¶ 37-40 (Paisley); 342, ¶¶ 132-135 (Reynolds); 336, ¶ 71; 343, ¶¶ 140-141 (Kitson); 344, ¶¶ 148-150 (Crandon).) [1]

Before the government formally offered any of the men these positions, the men learned that, if they left Boeing, they might be eligible for severance payments in accord-

---

[1] "JA" refers to the Joint Appendix filed in the Court of Appeals.

ance with long-standing Boeing policy. (App. 16a, ¶ 5. *See also* JA 330, ¶ 5; 422, 444, 906-912, 1020, 1028-1029, 1056, 1060.) In response to invitations from Boeing personnel officials, each man prepared and submitted to Boeing his own estimate of the anticipated financial impact of retiring or resigning from Boeing at that stage of his career. (JA 332, ¶ 25; 333, ¶ 41; 335, ¶ 55; 336, ¶ 72; 338, ¶ 87.)

In estimating the probable financial impact of leaving Boeing, each man attempted to analyze all possible economic consequences. Among the losses considered were accrued but non-vested benefits that were based solely on the employee's past service to Boeing. These forfeitable benefits included unvested matching contributions that Boeing had made to the employees' Voluntary Investment Plan; sick-leave and vacation benefits that had already been earned but would not ordinarily be redeemed if an employee left Boeing voluntarily to go to work for a competitor; the forfeiture of stock options that were not yet exercisable; and the adverse financial impact of being forced immediately to liquidate all Boeing stock interests. (*See, e.g.*, JA 901, 1031-1033, 1057-1059, 1068-1069.) For some of the men these losses also included retirement benefits that would be forgone as a result of taking early retirement from Boeing. The government's case, however, focused on the fact that in compiling these lists of all possible financial impacts, the men also included obvious reductions in income and increases in living expenses if a Boeing employee accepted a government position and moved to the Washington, D.C., area.

Before leaving Boeing, the men did receive lump-sum severance payments.[2] When they received the payments, none of the men had been appointed to, or even formally

[2] Crandon received $40,000; Jones received $132,000; Kitson received $50,000; Paisley received $183,000; and Reynolds received $80,000. App. 2a-3a.

offered, the proposed government positions. The government stipulated that, at the time, the men had no right to any federal employment and the government had assumed no obligations to any of the candidates. (JA 244 ¶ 88; 255, ¶ 127; 270, ¶ 172; 282, ¶ 211; 295, ¶ 251.) Each of the men was told that the purpose for the unconditional termination payment was to sever all financial ties to Boeing, thereby preventing any potential conflict of interest in the future. (App. 20a ¶ 25. *See also* JA 423-424, 433, 925, 960, 1032-1034, 1044-1045, 1055-1056, 1070.) The severance payments were theirs to keep, regardless of whether they actually survived the screening process and received the proposed government appointments, and regardless of how long they might stay with the government or what their salary levels might be. (App. 18a, ¶ 17. *See also* JA 423, 445, 935, 962, 1034-1035, 1044, 1061.)

The amount of each severance payment was substantially lower than the figures suggested in petitioners' own analyses. None of the men ever knew before this suit was filed the basis on which Boeing had calculated his severance payment, or which of the many financial factors, *if any*, Boeing had taken into account in deciding the appropriate amount of the payment. (JA 422-423, 444, 907, 909, 919, 923, 929, 955, 1045, 1056.) For example, Jones testified that "[t]he amount of severance pay I received was not equal to any individual figure in my estimate, nor could I duplicate that figure by combining any of those estimates." (JA 816.)[3]

[3] In recommending the appropriate range of severance payment, Boeing personnel officials performed some calculations based on the difference between Boeing salary and prospective government salary over an assumed period of service. The final decision whether to make the payments, however, and what the amount should be rested with Boeing's chairman. He testified that he determined the actual amounts to be paid on the basis of what he decided was the proper reflection of the employees' years of contribution to Boeing. (App. 19a ¶ 20; JA 442, 555-56, 595-96, 645-46, 653.)

Nor were these severance payments concealed from the government. On the contrary, government officials confirmed the testimony of Paisley and Jones that both men had specifically discussed with Defense Department officials the propriety of receiving the proposed severance payments and had been assured that such payments were permissible and even customary. (JA 403, 1072-73.) After receiving his government appointment, each man disclosed his actual receipt of the payment to responsible government officials, including designated ethics officers at the DOD. Four of the men also completed government SF-278 Financial Disclosure Reports and included the severance payments as income received from Boeing, in accordance with the government's instructions.[4] (*E.g.*, JA 121-122, 126-127, 137-138, 148-149, 403, 1035-1037, 1060, 1062-1063.)

While employed by the government, none of the men was responsible for Defense Department contracting or procurement decisions. (App. 26a. *See also* JA 99, 299, 404, 429, 445, 1037.) Moreover, during their terms of government employment, Jones, Reynolds, Kitson, and Crandon did not participate in any Defense Department dealings with Boeing. Paisley generally recused himself from dealings with Boeing, and participated in selected Boeing-related issues only after receiving a specific direction to do so from his superior, the Secretary of the Navy. (App. 20a, ¶ 27. *See also* JA 102, 1074.)

Defense Department officials have uniformly attested that each man capably, faithfully, and honorably performed his public duties with impartiality and integrity. (App. 19a, ¶ 23. *See also* JA 301, ¶ 275; 333, ¶ 33; 334, ¶ 50; 335, ¶ 65; 337, ¶ 84; 339, ¶ 101.) For example, Secretary of Defense Weinberger presented both Reynolds and Jones with citations formally acknowledging their outstanding public service. In addition, the Secretary of

[4] Crandon's position did not require filing a Financial Disclosure Report. (JA 298; 338, ¶ 91.)

the Navy testified on behalf of petitioners at trial, declaring that Paisley "has been rendering outstanding public service in the highest traditions of our Government" (JA 418, 1074), and that Kitson "enjoyed an excellent reputation for capable and dedicated service" and that his performance "was outstanding in every way." (JA 419, 1075.)

These are the men against whom the Justice Department brought suit for allegedly breaching their "fiduciary duty of undivided loyalty" as government employees.

2. Trial Court Decision Finding No Violation

In 1986, more than four years after the petitioners received the severance payments in 1981 and 1982, the Justice Department filed a civil suit against Boeing and the recipients of those payments. The government claimed that Boeing's payment of the severance payments, and each man's receipt of his severance payment, violated the standard of fiduciary loyalty established by 18 U.S.C. § 209, a criminal statute prohibiting the payment or receipt of any "supplementation of salary, as compensation for . . . services as an officer of employee of the executive branch of the United States Government." 18 U.S.C. § 209(a). The government sought to recover *twice* the amount of the severance payments (plus interest)—once from Boeing and once from each recipient.

The claims were tried before the district court. The trial judge heard live testimony from two of the five individual defendants and the Secretary of the Navy. The parties stipulated that, if called, the testimony of two other defendants would be similar and the similar deposition testimony of the fifth defendant was also admitted into evidence. (JA 990, 1079.) The judge also received into evidence eight depositions (including those of two of the individual defendants and various Boeing officials) and numerous exhibits.

After several weeks of deliberation, the trial judge filed a detailed opinion dismissing all of the government's claims. The judge held as a matter of law that, in light of the language of Section 209 and the structure of the conflict of interest chapter, 18 U.S.C. §§ 201 *et seq.*, "the acceptance of a severance payment by a nongovernment employee does not violate 18 U.S.C. § 209." (App. 24a.) The judge also found as a fact that, even if Section 209 applied to pre-government-employment severance payments, the payments here did not violate Section 209 because neither Boeing nor the individuals intended the payments "as a supplementation to their government salaries or as compensation for their government services." (App. 24a-25a. *See also* App. 19a, ¶ 19.)

In addition, the judge found that the petitioners' disclosure of the payments in accordance with government regulations obviated any "potential conflict of interest" that might otherwise justify extracting the payment from them many years after they rendered their faithful government service. (App. 20a, 24a-25a.) As a final matter, the judge found that the government's claims to recover the amount of four of the five payments were barred by the three year statute of limitations for tort actions in 28 U.S.C. § 2415(b).

3. Reversal By Divided Appellate Court

The court of appeals, in a split opinion, reversed the district court's conclusion that Section 209 does not apply to severance payments made prior to entry into government service. (App. 5a-6a.) In addition, while the majority agreed with the trial court that liability can be imposed under Section 209 only when the defendant specifically intends to pay or receive the money "as compensation for government service," the majority rejected the trial judge's finding that Boeing did not possess the statutorily proscribed intent in making the payments. The court of appeals ruled, based on its own assessment

of the evidence adduced at trial, that Boeing had the requisite intent.

The panel, however, never addressed the *individual* recipients' intent in *receiving* the payments. Instead, ignoring the trial court's specific finding that the individual Boeing employees did not believe that the severance payments were intended as additional "compensation" for performing future government services, the majority simply declared that the recipients were liable for breaching their duty of loyalty to the government by accepting payments *given*—as the panel believed—with the intent to "supplement" their government compensation. Judge Hall, in dissent, objected that intent is an issue peculiarly within the province of the trier of fact and that the trial judge had not committed clear error in crediting the uniform live and deposition testimony of ten witnesses that neither Boeing nor the employees had had the requisite intent.

The divided panel also dismissed the trial judge's findings that the individuals' disclosures of the payments and subsequent exemplary performance obviated any "potential" conflict of interest.

Finally, the court of appeals affirmed the district court's ruling that four of the five claims *against Boeing* were barred by the three-year statute of limitations governing tort claims, but held that claims against the employees are governed by a six-year statute governing "implied contracts" (28 U.S.C. § 2415(a)) and were not time barred. (App. 10a-11a.) Thus, the majority concluded that "absent other considerations," the government is entitled to recover the severance payments from each of the recipients, but (with one exception) not from Boeing. (App. 9a-11a.)

Boeing and the individual employees petitioned for rehearing and suggested rehearing *en banc*. Rehearing was denied 2-1. The Fourth Circuit denied rehearing *en banc* by a vote of 6-5.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve An Important Question Regarding The Application Of A Criminal Statute To Private Sector Employees Who Enter Federal Government Service.

This case presents fundamental questions concerning the application and construction of an important federal conflict-of-interest statute, 18 U.S.C. § 209, which prohibits the payment or receipt of any "supplementation of salary" as "compensation for . . . services as an officer or employee of the executive branch of the United States." The principal issue of statutory interpretation is whether Section 209 applies retrospectively to severance payments that private employees receive from their private employers before they receive or accept offers of employment from the federal government.

The government acknowledged below that it is not unusual for persons who leave the private sector for federal appointments to receive some form of "severance" payment from their private employers. Brief for the Appellant filed in the Fourth Circuit (July 22, 1987) at 16-18; *See also* JA 393 ¶ 209. The decision below creates enormous uncertainty for the many federal employees who have received severance payments in the past when they left the private sector, as well as for innumerable *prospective* federal employees and their private employers. This issue is especially timely, since the Nation is again changing its presidential administration.

The Justice Department has formally conceded in this case that this is the *first* time it has brought a case against anyone for receiving a severance payment *before* entering federal service. (JA 339, ¶ 102.) This is not surprising, since pre-employment severance payments are, as the government also conceded, common and since application of Section 209 to a person who is not serving as a federal employee or is not performing federal duties

at the time he receives the payment undermines the clear intent of Congress in passing Section 209 and conflicts with prior judicial decisions.

1. Section 209 was enacted in its present form in 1962, as part of a recodification of government ethics statutes. The structure of the chapter of Title 18 of which Section 209 is a part confirms that Congress chose its language carefully to make that section—but not some of the other conflict-of-interest statutes—apply only to *incumbent* federal employees.

For example, the federal bribery statute, 18 U.S.C. § 201—enacted at the same time as Section 209—applies to corrupt payments to a "public official *or person who has been selected to be a public official*." 18 U.S.C. § 201 (b)(1) (emphasis added). In telling contrast, Section 209 applies only to payments being made for "services *as an officer or employee*" of the United States. Indeed, in the bribery statute, Congress actually defined what it meant by "person who has been selected to be a public official," 18 U.S.C. § 201(a), but even that broad definition would not apply to any of the petitioners, since none had been "nominated or appointed" to office or "officially informed" that he would be so nominated or appointed, when he accepted his severance payment.

The dispositive point is that Congress was acutely sensitive to the distinction between *current* federal employees and *potential* federal employees when it enacted Section 209. It deliberately chose not to include *prospective* federal employees within Section 209—as it did with great care in Section 201.

Furthermore, the legislative history of Section 209 shows that the Fourth Circuit reached the wrong conclusion on this issue. Nothing in the committee reports surrounding the enactment of Section 209 (or its predecessor, former Section 1914) refers to severance payments from private sector employers as a matter of con-

gressional concern. Instead, both sections were aimed only at the distinct problem of the "Government official or employee who receives compensation for his government work" from a private benefactor while he is on the public payroll performing public duties. H.R. Rep. No. 748, 87th Cong., 1st Sess. at 3 (1961) (hereafter, "*House Report*"). The object was to ensure that the government alone is paying its own employees for performing their duties, thus avoiding "divided loyalty." That concern simply does not arise when a private sector employee has received an irrevocable severance payment from his own employer *before* he enters into government service. In these circumstances, the government employee cannot be tempted to consider how his performance of his government duties may jeopardize or generate "supplementary compensation" from a private benefactor.

Indeed, Section 209 was essentially a recodification of former Section 1914, which expressly prohibited only "*a Government employee* from receiving any salary in connection with his Government services from a private source" and made it an offense for anyone to make such a prohibited payment, as the Senate Report explained it, "*to a Government employee* . . . ." S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News, 3852, 3863 (emphasis added). When Congress reformulated former Section 1914 into current Section 209, Congress explained that it intended to maintain that limited focus, and explained that the *only* substantive change it was making in statutory coverage was to eliminate potential *overbreadth* by replacing the vague phrase, "in connection with his Government services," with the narrower phrase, "as compensation for such services as" a federal employee. *Id. See also House Report, supra*, at 24-25.[5]

[5] Former 18 U.S.C. § 1914 had provided criminal penalties for

> "Whoever, *being a government official or employee*, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, . . . or
>
> "Whoever . . . makes any contribution to, or in any way supplements the salary of, *any Government official or employee* for the services performed by him for the Government of the United States . . . ." (Emphasis added).

The Fourth Circuit apparently ended its foray into the legislative history of Section 209 after it noted that the phrase "Whoever, being a Government official or employee" had been deleted in the transition from former Section 1914 to current Section 209. The Fourth Circuit inferred that this change "indicates that payment need not occur during federal employment . . . ." (App. 6a.) In so holding, however, the Fourth Circuit simply ignored the explanation provided in the legislative history that the *only* intended change from Section 1914 to Section 209 was to eliminate potential *overbreadth*.

[6] *See also President's Message Relative to Ethical Conduct In Government Act*, H.R. Doc. No. 145, 87th Cong., 1st Sess. (April 27, 1961) at 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 1141, 1142 (statutory revisions needed to eliminate "wholly unnecessary obstacles to recruiting qualified people for Government service").

By ignoring the legislative history behind Section 209, the Fourth Circuit has undermined Congress' overriding objective in passing the 1962 conflict-of-interest revisions, including Section 209, which was "to strike a more precise balance between the Government's interest in having faithful employees on the one hand and an unhampered source of valuable talent on the other." 108 Cong. Rec. S21990 (Oct. 3, 1962) (remarks of Sen. Hruska).[6] As Judge Hall recognized in his dissent, the decision below "has tipped that balance and advanced a much more restrictive policy than Congress ever intended." (App. 14a.)

2. Other circuits have recognized that Congress intended Section 209 to be limited to incumbent federal officials. In *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979), for example, the District of Columbia Circuit ruled that Section 209 does not apply to payments to persons who are neither serving as federal employees nor performing federal duties at the time they receive

the payments. The court there reversed the conviction under Section 209 of a federal official who, while "on leave from his Government position," traveled to Ireland with his wife to attend a conference that the government had refused to pay for, and received reimbursement from an insurance broker for both his and his wife's trip. *Id.* at 970. The insurance broker had retained the defendant to assist in the sale of insurance because of contacts the defendant had made in the course of his duties as a government official. The court nevertheless held that, since the defendant was "on [annual] leave from his Government position," the requirement that the payments be made to compensate the recipient for services *as a government employee* "presents an insurmountable obstacle to conviction in this case." *Id.* at 969-970.

Similarly, the Ninth Circuit in *United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978), also concluded that Section 209 applies only to incumbent federal employees. In *Raborn*, a prosecution of a federal employee for bribery, the court explicitly recognized that Section 209 only "prohibits (1) *an officer or employee* . . . of the United States" from receiving salary supplements "as compensation for services as an employee of the United States." *Id.* at 691-92 (emphasis added).

Thus, the District of Columbia Circuit and Ninth Circuit understand that to apply Section 209 to payments received prior to accepting federal employment would stretch beyond recognition that conflict of interest statute as well as principles of agency law that underlie it. No petitioner in this case was an "officer or employee . . . of the United States"—and none had even been formally offered a job as an "officer or employee of the United States"—at the time he received his severance payment. The Fourth Circuit, however, held that "[e]mployment status at the time of payment is not an element of a violation." In so holding, the court imposed fiduciary duties to the federal government on private citizens who at the

time have no employment connection with the government and who, as the government conceded, might never have such a connection. (App. 6a.)

As the law now stands, therefore, whether it will be a crime for private-sector employees to receive severance payments from their employers before they enter public service may turn on whether the Justice Department chooses to invoke venue in Virginia—where the Pentagon and many other federal agencies are based—or across the Potomac in the District of Columbia, where *Muntain* is the law.

3. The decision by the Fourth Circuit will have the regrettable consequence of making it more difficult for the government to recruit qualified, high-level employees at a time when the government is facing a crisis with regard to such recruitment.[7]

The Secretary of the Navy testified in support of the petitioners that the recruitment of high-level officials for government positions is made very difficult by the financial losses that those individuals incur by leaving the private sector for government employment. (JA 1073.) He stated that, because of that difficulty, "severance payments are a common occurence when highly respected, highly expert, senior officers and employees of private-

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[7] *See* The Hudson Institute, *Civil Service 2000* (a study prepared for the U.S. Office of Personnel Management), at 29 (June 1988) ("The Federal government faces a slowly emerging crisis of competence. . . . For many high-skill jobs in expensive regions, Federal compensation is increasingly non-competitive." *See also The Report of The President's Commission on Compensation of Career Federal Executives*, at 30 (February 1988) (concluding that the "Federal Government is at a substantial disadvantage in competing for the best of our nation's executive talent. This is not a temporary or transient phenomenon, and it is due in great measure to the defects in the SES [Senior Executive Service] compensation system . . . .").

sector companies leave those positions in order to perform public service." (JA 417.) This testimony is unrebutted.

With the possible exception of the District of Columbia Circuit, no circuit's ruling could have been more detrimental to the government's ability to recruit qualified employees. A large percentage of government employees make the Fourth Circuit states of Virginia and Maryland their homes. Moreover, many government agencies have headquarters or major facilities in the Fourth Circuit, such as the Pentagon and the Central Intelligence Agency in Virginia, and the Department of Energy, the National Security Agency, and the National Institutes of Health in Maryland.[8]

This Justice Department-created obstacle seems particularly gratuitous since it imposes a drastic prophylactic prohibition without any evidence of any underlying problem with private-sector severance payments. Indeed, it is highly significant that, despite the Justice Department's desire to pursue this case, the government was forced to concede below that no officer or employee of the Department of Defense had concluded that, as a result of petitioners' receipt of severance payments from Boeing, any of the petitioners had engaged in a "conflict of interest situation" or committed any "breach of the fiduciary duty of individual loyalty" owed to the United States during government employment. (JA 339, ¶ 103; Trial Exhibit 164.)

It is the proper province of Congress and the President—not the Justice Department or the Fourth Circuit—to decide whether some compelling public policy justifies creating a new deterrent to public service by making

[8] It is estimated that the South Atlantic Region of the country, which includes the District of Columbia and the Fourth Circuit states of Virginia, Maryland, West Virginia, and North and South Carolina, contained at least 32% of all federal employees in 1986. *Civil Service 2000*, *supra*, at 5. This percentage may be underestimated, and is expected to grow. *Id.* at 4.

it a crime for private-sector employees to receive severance payments from their employers before they enter public service.[9] This Court should restore the balance that Congress and the President have decided best promotes the public interest.

II. The Court Of Appeals Weakened The Principle That Government Employees Are Protected Against Later Charges Of Potential Conflict Of Interest When They Comply With Government Regulations And Disclose A Relationship Creating A Potential For Conflict.

This Court should resolve the important federal question whether a federal employee's timely disclosure of a financial relationship with a former employer negates any "potential" conflict of interest and protects the employee from any criminal or civil liability based on that relationship. In particular, the Court should decide whether liability should be foreclosed when the employee discloses the relationship to the employee's government superiors and to designated agency ethics officials, as well as in government forms completed in compliance with the government's instructions. The Fourth Circuit is at odds with this Court and other circuits over the effect of such disclosures.

1. The government, in proper reliance upon opinions of this Court and other circuits, has conceded that adequate disclosure of a financial relationship that might otherwise create a breach of fiduciary duty can obviate

[9] Just recently, in vetoing the "Post-Employment Restrictions Act of 1988" (H.R. 5043, 100th Cong., 2d Sess.), President Reagan noted that "[i]t is already difficult to recruit talented people into the senior ranks of Government." The President believed it necessary to take the extraordinary measure of vetoing a congressional bill because of his concern that increasing deterrents to public service would mean that "[m]any of the most talented might never sign up to serve their country, and the country would be the worse for it." President Reagan's *Memorandum of Disapproval*, November 23, 1988.

such a potential breach. (Brief for the Appellant, *supra*, at 43-45.) *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *United States v. Kenealy*, 646 F.2d 699, 704 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978). In *Mississippi Valley*, this Court recognized that, while disclosure of a potential conflict of interest to an immediate superior does not necessarily obviate that conflict (because the superior might share the conflict), disclosure of the conflict to the *proper* authorities might well negate any conflict. The Fourth Circuit itself acknowledged that "under the common law, only secret profits present a conflict." (App. 8a, *citing United States v. Kenealy*, *supra*, at 704-05.) *See also Continental Management, Inc. v. United States*, 527 F.2d 613, 617 (Ct. Cl. 1975) (injury to principal arises from "agent's receipt of *secret* profits" (emphasis added).

There is no dispute that the petitioners in this case disclosed to the government the fact that they had received substantial severance payments from Boeing, and that they made those disclosures in full compliance with federal regulations and instructions. Nevertheless, the panel rejected out of hand petitioners' arguments that their disclosures negated any potential conflict of interest resulting from receiving or retaining the severance payments. The majority held that, although adequate disclosure was a defense in common law breach of fiduciary duty cases, disclosure in this case was irrelevant because this action "is based on a violation of the standards of § 209." (App. 8a.)

The Fourth Circuit's assertion, however, is inconsistent with this Court's analysis in *Mississippi Valley*—which the government concedes to be an analysis of a similar statute (Brief for the Appellant, *supra*, at 38)—and misapprehends the nature of this lawsuit. This case was brought not under 18 U.S.C. § 209, but rather as a

federal common law claim alleging a breach of loyalty. The government invoked Section 209—a criminal statute that does not explicitly create any civil cause of action—to define the scope of the fiduciary duty that petitioners were alleged to have breached in this case, just as *Mississippi Valley* used former Section 434 of title 18 to define the scope of duty in that case. For this reason, the first sentence of each of the government's counts against the defendants states plainly that this is "an action brought . . . *at common law*." (Complaint at 1, 9, 11, 13, 15, 17.) Common law principles that have been developed in breach of fiduciary duty cases involving federal employees, therefore, properly govern this case. The Fourth Circuit erred in holding that adequate disclosure cannot obviate any "potential" conflict premised on a statutory requirement of undivided loyalty.

2. The majority also suggested that, even if "nondisclosure was an element here . . .," petitioners' "disclosures . . . of total income from Boeing, combining salary and the severance payments in one figure, reported on financial disclosure forms . . . . [a]re not sufficiently complete to insulate the payments from the conflict of interest laws." (App. 8a.) This holding cannot be squared with the holding of the First Circuit in *Kenealy* that "purported disclosures" that may obviate a potential conflict of interest "must be evaluated against the regulations that provide evidence of the extent of the fiduciary duty" and define the standards of disclosure that must be met. *Kenealy*, *supra*, 646 F.2d at 704. Here, the relevant regulations establish that Designated Agency Ethics Officials ("DAEOs") at the Defense Department have the definitive responsibility for identifying and remedying potential or actual conflicts of interest by incumbent or prospective Defense Department employees.[10]

[10] *See* 5 C.F.R. § 738.201 (DAEOs appointed to "coordinate and manage [each] agency's ethics program"); 32 C.F.R. § 40.5(b)(8)

Pursuant to the regulations, Messrs. Jones, Paisley, Reynolds and Kitson each submitted a required "Form SF-278 Financial Disclosure Report" to the appropriate DAEO.[11] The government does not dispute that the petitioners completed those forms in compliance with the government's instructions. They included the severance payments along with salary and other income from Boeing, and accurately disclosed the size of their financial relationship with Boeing. The panel dismissed those disclosures merely as "[b]lanket disclosures that fail to differentiate ordinary and extraordinary payments . . . ." (App. 8a.) This analysis, however, is contrary to the very principle that is recognized in *Kenealy*: adequacy of disclosure is measured by the government's own rules and regulations. Here, the government's express instructions for completing the SF-278 Financial Disclosure Forms *required* the reporting employee to *aggregate* all forms of earned and non-investment income received from a single source. *See* Trial Exhibit 152; 32 C.F.R. § 40.10 (b). For obvious reasons, the government has decided that what matters in assessing the potential for a conflict of interest is the source and size of a government appointee's outside income, not the classification of the individual components from a particular source.

Indeed, the Defense Department's General Counsel's Office, which has supervisory authority over the DAEOs, *see* 32 C.F.R. § 40.17(b) (1980), has formally acknowledged to Congress in commenting on *this* case that the reporting procedures have "no requirement for segregating payments from employers into those that are severance payments and those that are part of regular compensation." (JA 448.)

(1987) (DAEOs responsible for establishing procedures promptly to identify, evaluate, and remedy potential or actual conflict of interest laws); 32 C.F.R. §§ 40.5(b)(3), 40.10 (1987) (DAEOs to "[e]nsure the proper collection, review, and handling of all financial disclosure reports," including SF-278 financial disclosure reports).

[11] As previously noted, Crandon was not required to complete an SF-278 Financial Disclosure Report.

Moreover, the Fourth Circuit inexplicably chose to overlook the fact that, as the district court specifically found, at least two of the petitioners, Jones and Paisley, had specifically and separately disclosed their severance payments to attorneys in the Offices of the General Counsel of the Departments of Defense and the Navy, who advised them on filling out their disclosure forms and then reviewed and approved them. (App. 20a, ¶ 26.) This is just the type of disclosure that *Mississippi Valley* and *Kenealy* contemplated as being sufficient to obviate the *potential* for conflict. Further, after reviewing the forms, and at least in the instances of Messrs. Jones and Paisley with specific knowledge of the severance payments, the DAEOs certified that they had "reviewed the interests reported . . . in light of the duties required by the reporting individual's position" and that they were "satisfied that *there is no actual or potential conflict of interest.*" (JA 116-148 (emphasis added).) Thus, the petitioners did everything the government called upon them to do, and more.

In nevertheless imposing liability upon them for a breach of duty of undivided loyalty, the Fourth Circuit departed from the important and previously recognized principle that an employee's disclosure of a financial relationship with a third party enables his employer to guard against any hint of divided loyalty and thus dissipates any "potential conflict of interest." This Court should reinstate this important principle and assure federal employees that the government cannot retroactively change the rules and penalize them for pursuing the course that the government had previously mapped out for them.

III. The Fourth Circuit Again Overstepped The Bounds Of Appellate Review Of Trial Court Findings Of Fact In Contravention Of This Court's Holding In *Anderson v. Bessemer City* And Other Cases.

This Court has repeatedly sought to remind the courts of appeals that it is improper for them to retry issues of fact resolved at a trial. *E.g., Anderson v. Bessemer City*, 470 U.S. 564 (1985); *FERC v. Martin Exploration Management Co.*, —— U.S. ——, 100 L. Ed. 2d 238, 108 S.Ct. 1765 (1988); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Nichelson v. Quaker Oats Co.*, 472 U.S. 1004 (1985); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). In the decision below, the Fourth Circuit has reverted to substituting its impressions about the facts for the determinations of the fact-finder at trial, just as it did in *Bessemer City*.

The panel properly recognized that Section 209, like most criminal statutes, incorporates an intent requirement. (App. 7a.) Section 209(a) actually defines two separate offenses, with separate intent requirements. The first paragraph subjects to criminal penalties a person who "receives any salary . . . or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . ." Under this section, the individual must understand that he is being given the payment "as compensation for his services" as an employee of the United States. 18 U.S.C. § 209(a). The second paragraph subjects to the same penalties one who "makes" such a prohibited payment—the requisite intent here being that the payor intend the payment "as compensation" for the individual's "services as an officer or employee" of the United States. *Id.*[12]

[12] The court below recognized that Section 209(a) defines two different offenses. *See* App. 9a-10a (characterizing Boeing's making of the severance payment as a tort subject to a three-year limitations period, yet characterizing the individuals' alleged violation of the statute by receiving the payments as "contractual in nature" and subject to a six-year limitations period).

In this case, the trial judge found—after a full trial at which he heard live testimony and received hundreds of exhibits—that Boeing did not *make* any of the five payments with the requisite compensatory intent. (App. 24a-25a.) The Fourth Circuit overturned that finding, purportedly as being "clearly erroneous." (App. 7a.) In its petition for a writ of certiorari, Boeing contends that the panel did not legitimately apply the "clearly erroneous" standard of review, but rather made its own *de novo* assessment of the evidence regarding Boeing's intent. The individual petitioners agree.

Even if the Fourth Circuit were correct in overturning the trial judge's finding regarding Boeing's intent, however, the court still erred in imposing liability on the individual employees without regard to *their* intent in *receiving* the payments. The trial judge had explicitly found that the petitioners lacked such intent: "the severance payments were not accepted by the individual defendants as a supplementation to their government salaries or as compensation for their government services." (App. 24a-25a.) Completely ignoring the trial court's finding, and based solely on its implausible conclusion that *Boeing* intended to compensate its employees for future service as government employees, the panel found these reputable public servants liable for violating standards contained in a criminal statute.

The majority's *de novo* finding that Boeing *made* the payments with improper intent certainly does not establish the employees' liability for the separate and distinct offense of having *received* the payments with the prohibited intent. As the Fourth Circuit itself has previously recognized, "the donee's intent may differ from the donor's . . . *United States v. Miller*, 340 F.2d 421 (4th Cir. 1965)." *United States v. Evans*, 572 F.2d 455, 480

(5th Cir.), *cert. denied*, 439 U.S. 870 (1978). *See also United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975) ("obviously the donor's intent may differ completely from the donee's").

In his dissenting opinion (App. 12a-14a), Judge Hall emphasized that the majority never came to grips with the trial court's express findings that the individual Boeing employees lacked the intent necessary to violate Section 209(a). As Judge Hall noted, the trier of fact "after hearing substantial testimony and weighing the credibility of numerous witnesses" (App. 12a) specifically found that the "individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries." (App. 19a ¶ 22.) To the contrary, the trial court found that "[t]he severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing." (App. 20a ¶ 25.)

A finding concerning knowledge and intent is, of course, a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). As such, the finding must be upheld on appeal if "the district court's account of the evidence is plausible in light of the record viewed in its entirety," even if the appellate court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bessemer City, supra*, 470 U.S. at 574-75. *See Brown v. Ford, Bacon & Davis, Utah, Inc.*, 850 F.2d 631, 633 (10th Cir. 1988). Moreover, Federal Rule of Civil Procedure 52(a) demands "even greater deference to the trial court's findings" that depend, as Judge Hall emphasized here, on the trial judge's "determinations regarding the credibility of witnesses." *Bessemer City, supra*, 470 U.S. at 575.

The majority failed to address the issue whether the trial court's findings as to the individuals' intent were

clearly erroneous. This failure is not surprising since the court of appeals could not reasonably have rejected those findings under the standard enunciated in *Bessemer City* and *Pullman-Standard*. The lump-sum severance payments were fixed and irrevocable—*i.e.*, for the employees' to keep *regardless* of actual entry into federal service, salary received in federal service, duties performed in federal service, or time spent in federal service. The very character of those payments, therefore, belies the inference that the employees must have viewed the payments from their private-sector employer as "compensating" them for government service that they might —or might not—render in the future.

Moreover, both in live testimony at trial, and in deposition and affidavit testimony received into evidence by the trial judge, the individual petitioners presented unrebutted evidence that they understood that the severance payments were intended to liquidate their financial connections with Boeing and reward them for many years of distinguished past service to the company, not to "compensate" them for the government service they hoped to render if they actually obtained their proposed government positions. (JA 1057 (Jones); 1034, 1044 (Paisley); 1079 (Kitson); 444, 954-55 (Crandon); 424 (Reynolds).) Each of the petitioners testified—without contradiction —that he had *never* been told by Boeing, and had *never* learned in any other way, what factors Boeing took into account in calculating his severance payment. (JA 1045, 1056. *See also* JA 422-23, 444, 816, 907, 909, 923, 929, 955.) All each of the petitioners knew was that he had submitted financial statements to Boeing listing numerous factors reflecting the overall financial impact of leaving Boeing at that stage of his career, including forfeiture of accrued but unvested matching contributions to Boeing's Voluntary Investment Plan, forfeiture of accrued but unmatured stock options, loss of vacation benefits and sick leave, and diminished or forfeited retirement benefits. (*See, e.g.*, JA 901, 1031-1033, 1057-59.)

In short, even if Boeing *had* intended to make the payments "as compensation for government service"—despite the district court's finding that it did not—there was ample basis for the trier of fact to decide that the individual employees lacked any illicit understanding or intent as *recipients* of the payments from their employer. Certainly, this "account of the evidence" is at least "*plausible.*" *Bessemer City, supra*, 470 U.S. at 574 (emphasis added). The majority's overturning of the district court's factual finding, without even addressing this issue of the individuals' intent, flies in the face of *Bessemer City* and other clear directions from this Court regarding the nature of appellate review of findings of fact after trial. This Court should again correct the Fourth Circuit's straying beyond the limits imposed by Rule 52.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for full briefing and argument. In the alternative, summary reversal may be appropriate, especially on the Fourth Circuit's disregard of the *Bessemer City* rule.

Respectfully submitted,

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December 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 87-2054

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

THE BOEING COMPANY, INC.; MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT REYNOLDS; HAROLD J. KITSON; LAWRENCE H. CRANDON,
Defendants-Appellees.

Argued Dec. 3, 1987

Decided May 5, 1988

Before HALL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

ERVIN, Circuit Judge:

In 1981 and 1982, five Boeing Company ("Boeing") employees left the company to assume high-level positions in the Reagan administration. Before their federal employment began, Boeing made a large "severance payment" to each one with the payments totalling $485,000. In 1986, the government instituted this civil action to recover the amount of the payments from both Boeing and the individual employees based on 18 U.S.C. § 209

(a),[1] a conflict of interest statute. At trial, the district court found for defendants. *United States v. Boeing Co.*, 653 F.Supp. 1381 (E.D.Va.1987). The government appeals. We affirm in part and reverse in part.

I. The Facts

During 1981 and 1982, the federal government recruited the five individual defendants for positions in the Department of Defense (DOD) or NATO. Boeing encouraged the men to accept the positions and gave each a significant severance payment upon their termination from Boeing. The details of the payments are as follows.

(1) Thomas K. Jones became Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces on June 1, 1981. He received $132,000 from Boeing on May 19, 1981.

(2) Herbert A. Reynolds became a Defense Department consultant on July 26, 1981, and Deputy Director of Space and Intelligence Policy on October 4, 1981. He received $80,000 from Boeing on July 22, 1981.

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[1] § 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, or any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(3) Melvyn R. Paisley became Assistant Secretary of the Navy for Research, Engineering and Systems on December 2, 1981. He received $183,000 from Boeing on October 1, 1981.

(4) Lawrence H. Crandon became a computer scientist for the NATO Air Command and Control Systems Team on March 8, 1982. He received $40,000 from Boeing on March 5, 1982.

(5) Harold Kitson became a Defense Department consultant on August 2, 1982, and Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence in September, 1982. He received $50,000 from Boeing on July 31, 1982.

While T.A. Wilson, Boeing's chairman and chief executive officer, determined the actual amount of each payment, lower level employees and the departing employees made preliminary calculations based on the financial impact of moving from Boeing to the government. Calculation factors included salary and benefit differentials, higher living costs, moving expenses, and the expected length of government service. A separate payment not at issue here cashed out the employees' interests in existing benefits. Boeing made a total of twenty-one such severance payments between 1962 and 1982 to encourage government service and sever all financial ties between Boeing and the departing employees. Employees entering government service at the state and local levels were allowed to go on paid leave instead of resigning.

The existence and the amount of the payments were disclosed initially in Financial Disclosure Reports filed by each individual. In late 1981, employees of the Defense Contract Audit Agency (DCAA) became aware of the nature of the payments. Boeing sought to include the payments in overhead calculations, in effect charging the government for them. Later, Boeing agreed not to include them in overhead. On March 22, 1982, the DCAA

notified the DOD contracting officer for Boeing of the payments and their nature. The matter was referred to the Justice Department on July 14, 1982. After an unexplained delay of nearly three years, the Justice Department and Boeing executed an agreement tolling the statute of limitations on March 25, 1985. The government filed this action on July 22, 1986.

In a bench trial, the district court found for the defendants reasoning that: (1) severance payments made prior to government employment do not violate the standards of § 209; (2) subjective intent is required to violate § 209, and no intent was shown; (3) because the payments were disclosed, they did not violate common law agency principles which prohibit only secret, undisclosed profits; (4) the payments created neither the appearance of nor an actual conflict of interest; and (5) the three year statute of limitations, 28 U.S.C. § 2415(b), bars the claims against Boeing for the first four payments.

The issues on appeal are whether § 209 applies to severance payments made prior to government service, whether § 209 includes an intent element, whether § 209 includes an injury element, and the statute of limitations.

II. 18 U.S.C. § 209

This is a case of first impression in which the government seeks to apply the standards of § 209 in a civil action to recover severance payments made before five individuals began their government employment. Section 209(a) provides, in relevant part:

> Whoever receives any salary, or any contribution to or supplemention of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . .; or
>
> Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Although the conflict of interest statutes, including § 209, are criminal in nature, civil remedies exist based on the fiduciary duty owed by federal employees. *See United States v. Kenealy*, 646 F.2d 699, 703 (1st Cir.), *cert. denied*, 454 U.S. 941, 102 S.Ct. 478, 70 L.Ed.2d 250 (1981); *United States v. Kearns*, 595 F.2d 729, 733 (D.C.Cir.1978); *Continental Management, Inc. v. United States*, 527 F.2d 613, 617, 208 Ct.Cl. 501 (1975). That duty is defined by the statutory standard of conduct. *Kenealy*, 646 F.2d at 703; *Continental Management*, 527 F.2d at 617, 620. Therefore, the government has a civil cause of action based on the statutory standards of § 209.

A. Preemployment Severance Payments

Section 209 prohibits outside "contribution to or supplementation of salary, as compensation for his services as an officer or employee" of the United States. On its face, this does not require that payment occur while the party was a government employee. The district court, however, read § 209 to require payment during government employment. *Boeing*, 653 F.Supp. at 1386; *see also United States v. Raborn*, 575 F.2d 688 (9th Cir.1978) (in dicta, stating that status as an employee is an element of a violation of § 209). Because the statutory language is ambiguous, we turn to the legislative history of § 209.

Prior to 1962, § 209 was codified at 18 U.S.C. § 1914, and provided "[w]hoever, being a Government official or employee, receives any salary in connection with his services. . . ." In 1962, Congress eliminated the phrase "being a Government official or employee," a phrase which did require employment status at the time of payment.

This change indicates that payment need not occur during federal employment; a preemployment payment to supplement salary could also violate § 209.

The policy behind § 209 and the conflict of interest laws in general also support a broad interpretation of its coverage. The statutes are

> directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil.

United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562, 81 S.Ct. 294, 315, 5 L.Ed.2d 268 (1961). Congress has established rigid rules of conduct to ensure that this faith is maintained. *Id.* at 551, 81 S.Ct. at 310; *Kenealy*, 646 F.2d at 703; *Continental Management*, 527 F.2d at 620. Large severance payments by defense contractors to those going to work at high levels in the Defense Department certainly "arouse suspicions," and those suspicions are not reduced by making the payments just before government service begins.

Therefore, we conclude that payments made prior to the onset of federal service can violate § 209. Employment status at the time of payment is not an element of a violation. All preemployment payments do not necessarily run afoul of § 209, so we must still determine whether these payments were made to supplement salaries "as compensation for . . . services as an officer or employee of the United States."

B. Intent

The government argues that the conflict of interest statutes, including § 209, set forth an objective standard of conduct which does not include an intent requirement. This ignores the language of § 209, that payments must be made "as compensation for" services as a government employee. The district court found that neither Boeing nor the individual defendants intended the payments to be compensation for their government services.

The court's finding was based largely on statements by the individual defendants and others at Boeing that payments were not made with that intent. Other evidence in the record contradicts these statements. First, the payments were calculated in large part based on the financial impact of moving from Boeing to the government. The individual defendants and other Boeing employees calculated salary, benefits and cost-of-living differences over the expected term of government employment. The chairman, who decided the ultimate amount, received a recommendation and was aware of the factors used to reach that figure. Second, Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment. These financial penalties include lower salary and benefits, so the payments were advance supplements to ease the pain of transition. Third, the parallel practice of providing paid leave for state and local service suggests that payments to federal employees were designed to do the same thing without technically violating § 209. Finally, the fact that in twenty-five years only twenty-one such payments were made, and only to those entering high level government service similarly suggests an intent to supplement the federal salaries of a limited number of employees. Viewing all of the evidence, we find that the five payments here were made with compensatory intent, and that the trial court's finding of no such intent was clearly erroneous.

C. *Injury*

The defendants vigorously argue that the government was not injured by the payments because there was neither the appearance of nor an actual conflict of interest. Testimony as to their exemplary work records and the absence of complaints within DOD was offered to prove that no injury occurred. This ignores the preventive nature of the conflict of interest laws, that the appearance of conflicts rather than actual conflicts or corruption is all that is necessary. *See Mississippi Valley*, 364 U.S. 549, 561-62, 81 S.Ct. at 315; *Kearns*, 595 F.2d at 734; *Continental Management*, 527 F.2d at 618. The appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption. The knowledge and approval of superiors does not alleviate the situation. *Mississippi Valley*, 364 U.S. at 561, 81 S.Ct. at 315.

Similarly, the defendants argue that their disclosure of the payments negates any injury because under the common law, only secret profits present a conflict. *See Kenealy*, 646 F.2d at 704-05; *Kearns*, 595 F.2d at 734. This action, however, is based on a violation of the standards of § 209, which is not limited to secret compensation. Even if secrecy or nondisclosure was an element here, effective disclosure must be formal, complete, and directed to the proper parties. *Kenealy*, 646 F.2d at 705. Here, the disclosures were statements of total income from Boeing, combining salary and the severance payments in one figure, reported on financial disclosure forms. Blanket disclosures that fail to differentiate ordinary and extraordinary payments are not sufficiently complete to insulate the payments from the conflict of interest laws.

To summarize, we hold that payments made to future federal employees before they begin government service can violate § 209, if they are made with compensatory

intent. Injury in the form of corruption or an actual conflict of interest is not required; the appearance of a conflict is sufficient to violate § 209. Specifically, we find the severance payments by Boeing to the individual defendants were made with the intent to compensate for government service and created the appearance of a conflict of interest. Therefore, they violated § 209, and, absent other considerations, the government is entitled to recover the amount of the payments from either Boeing or the individuals.

III. The Statute of Limitations

A. *Boeing*

The claim against Boeing is based in tort for the inducement of a breach of duty by the individual defendants and for making payments in violation of § 209. A three year statute of limitations applies under 28 U.S.C. § 2415(b).[2] Boeing executed an agreement tolling the limitations period on March 25, 1985. Therefore, the critical date is three years before that date, March 25, 1982, and the inquiry becomes did the cause of action against Boeing accrue before that date.

The cause of action accrued at the time the tort was committed, here being the date of payment. Four of the five payments occurred before March 25, 1982. The statute of limitations bars the government's claim for those four payments absent something tolling the limitations period. That something, argues the government, is 28

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[2] 28 U.S.C. § 2415(b) provides, in relevant part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues . . .

U.S.C. § 2416(c),[3] which excludes from the limitations period any period during which the material facts are not and reasonably could not have been known by a government official charged with the responsibility to act.

That official, according to the Justice Department, was the DOD contracting officer for Boeing who learned the relevant facts in a memo from the DCAA on March 26, 1982. The government fails to explain, however, why DCAA employees charged with auditing responsibilities were not charged with the responsibility to act here. Conclusory statements that the contracting officer was the first official with the knowledge and ability to recognize a conflict do not justify tolling the statute under § 2416 (c) and are refuted by the fact that DCAA employees and managers recognized that a problem existed. The decision to refer that problem to the contracting officer does not diminish their ability to act. Therefore, we find that the statute of limitations was not tolled under § 2416(c), and that four of the five claims against Boeing are time-barred. Only the claim based on the final payment to defendant Kitson on July 31, 1982, falls within the limitations period.

B. The Individual Defendants

The individual defendants were not parties to the tolling agreement of March 25, 1985, so the relevant date for claims against them is July 22, 1986, the date the government filed this action. Clearly, any three year limitations period had expired by then for all five payments.

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[3] § 2416. Time for commencing actions brought by the United States—Exclusions. For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

* * * *

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances;

However, violation of § 209 constitutes a breach of the duty of loyalty, and is contractual in nature. *See Jankowitz v. United States*, 533 F.2d 538, 548, 209 Ct.Cl. 489 (1976); Restatement (Second) of Agency, §§ 401 comment a, 403 comment a. Therefore, the six year statute of limitations in 28 U.S.C. § 2415(a)[4] applies. The payments all occurred after July 22, 1980, so none of the claims against the individual defendants is barred.

IV. Conclusion

We hold that the severance payments made by Boeing in this case violated 18 U.S.C. § 209. The government has a civil cause of action for the amount of each payment against both Boeing and the recipient of that payment, although double recovery by the government is not permitted. The three year statute of limitations in 28 U.S.C. 2415(b), however, bars the government's claims against Boeing for four of the five payments; only its claim based on the Kitson payment survives. The claims against the individual defendants are not time barred. Therefore, the decision below is

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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[4] 28 U.S.C. § 2415(a) provides, in relevant part:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: . . .

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that part of the majority's opinion finding that four of the five claims against Boeing are barred by the applicable three-year statute of limitations, 28 U.S.C. § 2415(b). I also agree that a six-year limitation period applies to the breach of the duty of loyalty claims against the individual defendants. I cannot join that part of the majority's decision, however, finding that the five payments here were made with compensatory intent. In my view, the district court's judgment should be affirmed in all respects.

Section 209(a) provides, in relevant part, that "[w]hoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services . . ." shall be guilty of a misdemeanor. This language clearly contemplates that, for a payment to violate § 209(a), it must both supplement the employee's salary and also be intended as compensation for the employee's services as an officer or employee of the government. It is evident, therefore, that Congress did not intend that payments were to be proscribed by 209(a) if they were made without culpable intent.

In this case, the district court found that these severance payments were not intended, either by Boeing or the employees, as compensation for their government service. Intent is a factual determination purely within the province of the district court. Here, after hearing substantial testimony and weighing the credibility of numerous witnesses,[1] the district court found as a matter

[1] The district court heard testimony from John F. Lehman, Secretary of the Navy, Melvyn Paisley, T.K. Jones and Harold Kitson, Jr.; and had before it the depositions of Charles P. Hogberg, H.K. Hebeler, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, T.K. Jones, Melvyn Paisley, Harold Kitson, Jr., Lawrence H. Crandon; as well as the deposition of the United States.

of fact that "[t]he severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services." I simply cannot agree with the majority's conclusion that the district court's findings were clearly erroneous.

In reaching its decision, the majority attaches great weight to the fact that Boeing relied in part upon the disparity between what the employees were earning at Boeing and what their anticipated government salaries would be, in calculating the amount of the severance payments. The majority quite correctly found that the severance payments tended to lessen the financial pain experienced by these employees in accepting government service. The majority inexplicably concludes, however, that since these severance payments were supplements, they must have been made with compensatory intent. Thus, the majority fails to articulate a distinction between payments intended as compensation and those which are not. Although the distinction is a fine one, it is clearly a distinction which Congress intended to make in enacting § 209(a).

The severance payments made here were in accordance with a policy followed by Boeing for over twenty years as a matter of good corporate citizenship. As the Secretary of the Navy articulated at trial, the purpose of the payments was to release the employees from their "golden handcuffs," or unvested benefits, as well as sever all financial ties between the employees and the company. Although there is evidence that these severance payments were calculated with the employees' prospective salaries in mind, the district court found that "[t]hose responsible for the ultimate decision were not aware of the specific calculation method," but approved the payments based upon what was determined to be "reasonable and fair to the departing employee[s]."

The majority minimizes the fact that the government, not Boeing, initiated the efforts to recruit these employees for government service. It is also undisputed that, after accepting government employment, these employees neither were in a position to provide, nor did they in fact provide, preferential treatment to Boeing. In sum, in enacting § 209(a), Congress recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector. By its holding today, this Court has tipped that balance and advanced a much more restrictive policy than Congress ever intended. For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

Civ. A. No. 86-0829-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE BOEING COMPANY, MELVYN R. PAISLEY, THOMAS K. JONES, HERBERT A. REYNOLDS, HAROLD KITSON, JR., and LAWRENCE H. CRANDON,
Defendants.

Feb. 17, 1987

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HILTON, District Judge.

Findings of Fact

1. The Boeing Company ("Boeing") is a corporation organized and existing under the laws of the State of Delaware. The corporate headquarters are located at 7755 East Marginal Way South, Seattle, Washington. Boeing maintains an office and conducts business within the geographical limits of the jurisdiction of this Court.

2. Defendant T.K. Jones ("Jones") is a resident of the State of Washington; Defendant Melvyn Paisley

("Paisley") is a resident of the Commonwealth of Virginia; Defendant Herbert A. Reynolds ("Reynolds") is a resident of the State of Washington; Defendant Harold Kitson, Jr. ("Kitson") is a resident of the State of Washington; Defendant Harold Crandon ("Crandon") is a resident of Brussels, Belgium.

3. Boeing traditionally has encouraged public service by its employees. Some forms of public service, such as service in state or local government, do not require a complete severance of the individual's employment relationship with Boeing. Boeing has made financial arrangements with its employees who accept positions in state and local government, such as paid leave, in an effort to diminish the personal economic incentives associated with public service.

4. Over the past twenty years, the Department of Defense has regularly solicited highly qualified employees from Boeing for government service. The government repeatedly has asked Boeing to assist it in identifying such qualified employees, and has specifically requested that Boeing encourage these employees to accept positions in the Federal government.

5. Boeing has a long-standing practice of making severance payments to individuals who terminate their employment with the Company in order to enter government service. In making these payments, Boeing has endeavored to encourage its employees to serve their government and provided a mechanism to completely sever all financial ties between Boeing and the departing employee.

6. During the period from 1962-1982, Boeing made at least twenty-one severance payments to individuals who terminated their employment with the Company in order to enter government service.

7. Boeing has repeatedly disclosed to the United States government, including responsible officials of the Department of Defense, the fact of these payments and the circumstances under which they are made. One such disclosure letter specifically noted that severance payments were calculated with reference to the differential between the financial benefits that would accrue to the employee if he remained with Boeing, as compared with those that would accrue to the employee if he accepted the anticipated government position.

8. Despite actual knowledge of Boeing's practice of making severance payments, the government has never objected to the practice, and on at least one occasion informed Boeing that a proposed severance payment was in compliance with the federal conflict of interest statutes.

9. During 1981 and 1982, each of the individual defendants was recruited from Boeing by the federal government for a position within the Department of Defense.

10. On or about May 19, 1981, Jones resigned from Boeing and, on or about June 1, 1981, he assumed the position of Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces.

11. On or about October 31, 1981, Paisley retired from Boeing. On December 2, 1981, following Senate confirmation, Paisley was sworn in as Assistant Secretary of the Navy for Research, Engineering and Systems. Paisley continues to serve in this position.

12. On or about July 22, 1981, Reynolds resigned from Boeing. On July 26, 1981, he became a consultant to the Defense Department and on October 4, 1981, received an appointment to the position of Deputy Director of Space and Intelligence Policy.

13. On March 5, 1982, Defendant Crandon resigned from Boeing. On or about March 8, 1982, he was appointed to the position of computer scientist with the

North Atlantic Treaty Organization ("NATO") Air Command and Control Systems ("ACCS") Team in Brussels, Belgium. Crandon continues to serve in this position.

14. On August 1, 1982, Kitson retired from Boeing. Kitson served as a consultant to the Department of Defense from August 2, 1982, until September 1982, when he was appointed Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence.

15. Boeing made severance payments to the five individual defendants on the following dates: T.K. Jones, May 19, 1981; Herbert R. Reynolds, July 22, 1981; Melvyn R. Paisley, October 1, 1981; Lawrence H. Crandon, March 5, 1982; and Harold Kitson, Jr., July 31, 1982.

16. At the time Boeing made and the individual defendants accepted the severance payments in question, the individuals were still employed by Boeing and had not yet entered into government service.

17. The severance payments made to the individual defendants were not contingent upon the individuals entering into federal government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at anytime in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future.

18. At the time the individual defendants left Boeing, Boeing did not make any commitment to rehire them at any time in the future and the individuals made no commitment to return to Boeing. Although Boeing might have been willing ultimately to reemploy the individuals, it had no expectation that the individuals would return to the Company at the time that they terminated their employment.

19. The severance payments to these individual defendants were not made with the intent that the individuals would give Boeing preferential or other favorable treatment during the term of their government employment, and the payments were not understood by the individuals as such.

20. Staff personnel in the Industrial Relations Department performed calculations to arrive at a proposed severance payment for presentation to individuals within Boeing with final decision making authority. Those responsible for the ultimate decision were not aware of the specific calculation method followed by the Industrial Relations Staff, and approved severance payments to the individual defendants based on their determination that the proposed payment was reasonable and fair to the departing employee.

21. Boeing never asked the individual defendants to provide it with any preferential treatment or special advantages during their tenures with the government, and the individuals in fact never provided Boeing with any such preferential treatment or special advantage.

22. The severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services. The individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries.

23. The government supervisors of each of the individual defendants were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest.

24. At no time has the Department of Defense taken any disciplinary or other adverse action against any of

the individual defendants, although it has had actual knowledge of their previous employment by Boeing and their receipt of a severance payment from Boeing.

25. The severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing. They were informed by Boeing that the payment was a means of avoiding any possible conflict of interest by severing all financial connections with Boeing.

26. Before entering into government service, during the course of routine ethics reviews, Messrs. Jones and Paisley disclosed to attorneys in the Office of the General Counsel of the Department of Defense and the Navy, respectively, of the fact and amount of the severance payments which they received from Boeing. Jones also discussed his receipt of the Boeing severance payment with his government superiors, Under Secretary of Defense Dr. Richard DeLauer, and Dr. DeLauer's Executive Office, Colonel Kenneth Hollander. Jones was assured that he could accept the anticipated severance payment.

27. Messrs. Jones, Reynolds, Kitson and Paisley disqualified themselves from working on any Boeing-related matters as of September 1982. The disqualifications applicable to Messrs. Jones, Reynolds and Kitson remained in effect for the balance of the period of their government service. Mr. Paisley resumed participation in a Boeing-related project on September 17, 1984, at the express direction of Secretary of the Navy, John Lehman. In his government position, Mr. Crandon has no direct procurement role, does not award contracts and does not make source selection decisions.

28. The amounts of the severance payments to the individual defendants were recorded in the overhead pools on the accounts of BAC. The account in which these payments were recorded is systematically and regularly

monitored by auditors of the Defense Contract Audit Agency ("DCAA") of the Department of Defense, resident at the Boeing facility. Payments were recorded on the following dates: Jones, May 21, 1981; Reynolds, July 30, 1981; Paisley, October 8, 1981; Crandon, February 25, 1982; Kitson, July 29, 1982.

29. During the course of such routine monitoring of BAC's overhead costs, DCAA auditors noted the severance payments to Messrs. Jones, Reynolds and Paisley. During the period from November 1981 to January 1982, DCAA auditors requested information from Boeing about these payments. In response, Boeing informed the auditors of the Company's historical practices of making severance payments and the basis for the severance payments to these individuals, including specifically the factors considered in arriving at the payment amount.

30. As a result of this dialogue, as of mid-February 1982, the DCAA Resident Auditor at BAC, the DCAA Branch Manager of the Puget Sound Branch, and Director of the San Francisco Region of DCAA were aware of the following: that severance payments had been made to Messrs. Jones, Reynolds and Paisley; the amount of the payments; the government positions assumed by these individuals following their separation from Boeing; the factors now alleged by the government to have been considered by Boeing in arriving at the amount of the payment; and the method by which Boeing accounted for those payments pursuant to Armed Services Procurement Regulation 15-205.39.

31. Each year the government calculates a percentage of costs included in the overhead pools of contractors that the government anticipates or projects will ultimately be disallowed when the overhead claim is closed. This calculation of anticipated unallowable costs is expressed as a percentage of the total overhead pools, and is called the withhold rates. The government unilaterally establishes these withhold rates. Boeing applies the withhold rate to

the overhead dollars to be billed on each contract, and the resultant dollars are withheld from periodic contract payments made by the government to Boeing.

32. The withhold rate is set annually and adjusted periodically during the course of the year at the discretion of the government's Administrative Contracting Officer. The withhold rate is set at a level intended to cover all potential unallowable costs. In the past, the application of the withhold rate has resulted in the government withholding monies in excess of Boeing Aerospace Company's total costs ultimately disallowed in every year.

33. In 1981, during the period in question, $7.8 million to $4.4 million was withheld. For 1982, $4.6 million to $3.9 million was withheld.

34. Overhead claims of Boeing Aerospace Company for the years 1981 and 1982 have not been finally settled to date. The withhold rates set by the government for those years are more than adequate to cover all costs which may ultimately be disallowed, including the severance payments paid by Boeing during those years. Moreover, even if the withhold rates established for 1981 and 1982 were not sufficient to cover all ultimately disallowed costs for those years, that will not be known until the overhead claims for those years are finally settled.

35. On March 22, 1985, at the request of the Civil Division of the Department of Justice, Boeing executed an agreement tolling the three-year statute of limitations governing the government's tort claim against Boeing, set forth in 28 U.S.C. § 2415(b). The agreement, which was prospective only, contained an effective date of March 25, 1985.

36. The Plaintiff commenced this action on July 22, 1986.

Conclusions of Law

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345, and venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

The government contends it has a cause of action under the federal common law for breach of fiduciary duty created by 18 U.S.C. § 209 against both the recipients of a salary supplement for government services and against the payer of such a supplement. It also claims a cause of action against the individual defendants for breach of an implied contract. At trial the government elected to proceed against Boeing in tort for breach of fiduciary duty and against the individual defendants for breach of implied contract.

At the time that Boeing made and the individuals accepted the severance payments in question, the individuals had not yet entered into government service and were not employees of the United States government. For this reason, there was no principal-agent relationship between the individual defendants and the United States government at the time that Boeing made, and the individuals accepted, those payments. *See Restatement (Second) of Agency*, § 387 (1958).

Because they were not government employees, the individual defendants owed no fiduciary or other duty to the United States government at the time of the severance payments. *See id.* In accepting those payments, the individuals therefore breached no common law or other duty owed to the United States government, and Boeing did not induce or otherwise participate in any breach of fiduciary duty by the individual defendants.

Even assuming that the individual defendants owed a fiduciary duty to the United States government at the time of the severance payments in question, neither the making, acceptance or retention of those payments constituted or induced in any fashion a breach of that duty.

18 U.S.C. § 209(a) provides . . .

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the Executive Branch of the United States government, of any independent agency of the United States, or the District of Columbia, from any source other than the government of the United States, except as may be contributed out of the treasury of any state, county, or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 209 forbids the supplementation of salary and does not apply to the giving of a severance payment by a private employer to an employee who has not, at the time of receipt, entered into government service. Moreover, the acceptance of a severance payment by a non-government employee does not violate 18 U.S.C. § 209. *See* S.Rep. No. 2213, 87th Cong. 2d Sess. *reprinted in* 1962 Code Cong. & Ad. News 3852, 3863.

Even if 18 U.S.C. § 209 were read to apply to the defendants in this case, the Court concludes that that statutory section was not violated. Based on all the evidence before the Court, including the testimony of the witnesses, the Court finds that the severance payments in question were not made by Boeing with the intention of supplementing the individual defendants' government salaries, nor were they intended as compensation for government services rendered by those individuals. Similarly, the severance payments were not accepted by the individual defendants as a supplementation to their government salaries or as compensation for their government services. The government contends that the use of salary loss as a method of computation necessarily has a prospective effect which equates to a salary supplementation. This ignores the fact that the use of salary figures and benefits are an accurate measure of past contributions to the company. Salaries are paid on the basis of length of service and level of performance. In any event the formula for calculation of severance pay cannot make the payment something other than severance pay. The payments made by Boeing were severance payments made to sever the relationship with these employees based on past performance and accumulated benefits. The payments therefore were not contrary to the standards of conduct established by Section 209. *See United States v. Muntain*, 610 F.2d 964 (D.C.Cir.1969).

The defendants cannot be said to have violated the Department of Defense regulations codified in 32 C.F.R. Part 40 (1980). Those regulations by their express terms apply only to employees of the Department of Defense. Because the individual defendants were not employees of the United States government at the time they accepted the payments, they were not bound by those regulations, and their conduct was not prohibited by the regulations. For this reason, the Court concludes that severance payments, as made here, did not violate these regulations.

The defendants also did not violate standards of conduct established by common law principles of agency. In accordance with those principles, an agent may be held liable to his/her principal for receipt of undisclosed, secret profits which create a conflict of interest. *See Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct.Cl.1975). The severance payments here at issue were timely disclosed to responsible agents of the United States government. The payments were not in the nature of "secret profits," and could not in any fashion tend to subvert the loyalty of the individual defendants to the

United States government. *See also United States v. Carter*, 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769 (1910); *United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 454 U.S. 941, 102 S.Ct. 478, 70 L.Ed.2d 250 (1981); *United States v. Kearns*, 595 F.2d 729 (D.C. Cir.1978).

These payments created neither the appearance of nor an actual conflict of interest. None of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government employee. Under these circumstances, neither the making nor the acceptance of the severance payments could be said to have created an actual or a potential conflict of interest, or a corresponding breach of the employees' duty of undivided loyalty.

The government was not injured by the making or acceptance of these payments. The severance payments were not made with the intent to secure preferential treatment for Boeing. The individuals never rendered preferential or other favorable treatment to Boeing during their respective periods of government service. Under these circumstances, the government cannot be said to have been injured by the challenged conduct. Having in fact suffered no harm, the government is not entitled to recover damages.[1] *See Continental Management, Inc. v. United States*, 527 F.2d at 619 n. 6.

Moreover, the government is not entitled to recover interest on the amount of the severance payments for the period of time during which they were recorded by Boeing as an overhead cost. At the government's direction, Boeing has withheld from the amount of overhead costs billed to the government on government contracts an

[1] In any event, the government would not be entitled to recover damages twice—once from Boeing, and once again from the individual defendants. *See Continental Management, Inc. v. United States*, 527 F.2d at 619.

amount which is sufficient to cover the amount of the challenged payments. The government therefore has not paid to Boeing an amount representing these payments. Again, having suffered no injury, the government is not entitled to recover the damages which it here claims. Moreover, inasmuch as Boeing's overhead rates for 1981 and 1982 have not been finally negotiated, this claim by the government is not ripe, and would be justifiable, if at all, only before the Board of Contract Appeals or Claims Court.

The defendant, Boeing, also raises as a defense the statute of limitations. The Court finds that the government's claims as to the first four of the questioned severance payments are barred by 28 U.S.C. § 2415(b). For purposes of computing the running of this statute of limitations period, the government's cause of action is deemed to have accrued on the date on which the severance payments were made. *See, e.g., United States v. Central Soya, Inc.*, 697 F.2d 165 (7th Cir.1982); *United States v. Limbs*, 524 F.2d 799 (9th Cir.1975); *Dameron v. Washington Magazine, Inc.*, 575 F.Supp. 1575 (D.C.D.C. 1983).

The severance payments to Messrs. Jones, Reynolds, Paisley and Crandon were each made more than three years prior to the March 25, 1985 effective date of the statute of limitations tolling agreement executed by Boeing on March 22, 1985. The government actually knew, or with the exercise of reasonable diligence could have known, all the facts underlying its cause of action as to the payments to Messrs. Jones, Reynolds, Paisley and Crandon, more than three years prior to March 25, 1985. Accordingly, the government's claim for damages against Boeing as to these individuals arising from these payments is time barred.

For reasons set forth above, judgment on all counts will be entered for the defendants.

An appropriate order shall issue.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2054

UNITED STATES OF AMERICA;
Plaintiff-Appellant

v.

THE BOEING COMPANY INC.; MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT REYNOLDS; HAROLD J. KITSON; LAWRENCE H. CRANDON;
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Virginia

JUDGMENT

[Filed May 5, 1988]

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part, reversed in part. The case is remanded to the Eastern District of Virginia for further proceedings consistent with the opinion filed herewith.

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2054

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

THE BOEING COMPANY, *et al.*,
Defendants-Appellees.

On Petitions for Rehearing with Suggestions for Rehearing In Banc

[Filed Sept. 7, 1988]

The appellees' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc; and Judges Winter, Phillips, Murnaghan, Sprouse, Ervin, and Wilkinson voted to deny rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Butzner. Judge Hall dissents.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-0829-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE BOEING COMPANY, MELVYN R. PAISLEY, THOMAS K. JONES, HERBERT A. REYNOLDS, HAROLD KITSON, JR., and LAWRENCE H. CRANDON,
Defendants.

ORDER

Pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that judgment is entered on behalf of the defendants, and this case is DISMISSED.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia

Date: Feb. 17, 1987

OPPOSITION

BRIEF

(2) (2)

Nos. 88-931 and 88-938

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether severance payments made by petitioner Boeing Company to five of its employees—which were made solely because the employees were to assume positions with the Department of Defense, and which were calculated to make up the difference between the departing employees' salaries and benefits with the federal government and their higher salaries and benefits with Boeing—violated the prohibition in 18 U.S.C. 209 against the supplementation of the salaries of federal employees.

2. Whether the court of appeals correctly required the recipients of those payments to forfeit them to the United States in this civil action.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-931

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-938

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 845 F.2d 476. The opinion of the district court (Pet. App. 16a-29a) is reported at 653 F. Supp. 1381.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-938.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-15a) was entered on May 5, 1988, and timely petitions for rehearing were denied on September 7, 1988 (Pet. App. 30a-31a). The petition for a writ of certiorari in No. 88-931 (Individuals' Pet.) was filed on December 5, 1988, and the petition for a writ of certiorari in No. 88-938 (Boeing Pet.) was filed on December 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 209(a) of Title 18 of the United States Code provides in pertinent part:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government * * * from any source other than the Government of the United States * * *; or
>
> Whoever * * * pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT

In 1981 and 1982, petitioner Boeing Company, a large defense contractor, paid a total of $485,000 to five of its employees, petitioners Melvyn Paisley, T.K. Jones, Herbert Reynolds, Harold Kitson, and Lawrence Crandon, who were about to accept high-level positions in the Department of Defense. Pet. App. 2a, 4a. The court of

appeals held that these payments violated 18 U.S.C. 209(a), which bars the supplementation of the salary paid for services as a federal employee, and that the recipients therefore must forfeit those payments to the United States.

1. The amounts Boeing paid to the five individual petitioners were called "severance payments," but they were neither rewards based on the recipients' past services to Boeing nor hardship payments to provide a financial cushion for employees between jobs. Rather, the payments were made only because the individual petitioners were to assume positions with the Department of Defense, and the amount of the payments was tied directly to their future government employment.[2] In fact, the evidence showed that during the preceding 20 years, Boeing had made only 21 similar payments, and in every case, the recipient left Boeing to accept a high-level position with the United States Government—typically in the Department of Defense or the National Aeronautics and Space Administration (NASA) and typically involving research and development or long-range defense planning. The payments were made to these recipients, including the five individual petitioners in this case, in order to encourage them to accept federal employment. No such payments were offered to Boeing employees who retired, left Boeing for other nonfederal employment, or accepted

---

[2] The amount of Boeing's payments to and the government positions accepted by the individual petitioners were: Paisley ($183,000), Assistant Secretary of the Navy for Research, Engineering and Systems; Jones ($132,000), Under Secretary of Defense for Strategic and Theater Nuclear Forces; Reynolds ($80,000), Deputy Director of Space and Intelligence Policy; Kitson ($50,000), Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence; and Crandon ($40,000), computer scientist for NATO Air Command and Control Systems Team.

lower-level government positions or positions at agencies other than those of special interest to Boeing. Pet. App. 4a, 8a, 17a-18a.[3]

The principal factor used to calculate the amount of the payment to each of the five individual petitioners was the anticipated difference between his salary and benefits with Boeing and the lower salary and benefits he would receive during the period of between three and four years that he expected to work for the Department of Defense. Each employee-petitioner calculated that differential over the projected three- or four-year period, which corresponded to the time remaining in the first Administration of President Reagan, and each submitted his calculation to Boeing.[4] Boeing's personnel officials then calculated the same

[3] See C.A. App. 61-65, 441, 547-549, 595, 638-639, 645-647, 682-683, 691, 777. Of the 20 Boeing employees who received such payments between 1962 to 1982 (petitioner Jones left twice and received a payment each time), 15 went to the Department of Defense and two went to NASA. The average payment made to those individuals was approximately $40,000. The average payment to the remaining three individuals was $6500. Those three accepted positions as (1) as a staff member of a congressional aeronautical and space science committee, (2) Assistant Secretary of Commerce for Science and Technology, and (3) Staff Leader of Aeronautical Research at the National Aeronautics and Space Council, Office of the President. At least 15 other individuals left Boeing for jobs with the federal government during the same period without receiving a severance payment. Only two of those individuals accepted positions with the Department of Defense, neither in a research-and-development position. C.A. App. 61-64.

[4] Some of the individuals also submitted a calculation of the value of vested benefits that they would lose upon leaving Boeing. However, each individual ultimately received separate checks from Boeing for the amounts to which all employees are entitled when they resign or retire, including vested salary and benefits earned and accrued (Pet. App. 4a). The government did not challenge those payments because they were made pursuant to a policy of general applicability and because they were based on past services the recipient actually performed

differential and used the resulting figure as the principal component of the proposed payment, which also included an amount to cover expenses of moving to Washington, D.C., and an estimated cost-of-living differential between Seattle and Washington, D.C. See C.A. App. 9-60. The payments as so calculated were then approved, virtually without change, by the Chairman of the Board of Boeing, T.A. Wilson. Wilson testified that he knew the payments were designed to alleviate the financial "hardship" that Boeing employees might experience in leaving to work for the federal government, including the lower salary and the moving expenses, and that one of the considerations in calculating the amount of the payment was the difference between the person's Boeing salary and his federal salary. Pet. App. 4a, 8a; see C.A. App. 645-646.[5]

2. The United States filed this civil action against petitioner Boeing and the five individual petitioners, seeking

for Boeing, not on his future employment with the federal government.

[5] The individual petitioners contend (Individuals' Pet. 5 n.3) that Wilson "determined the actual amounts to be paid on the basis of what he decided was the proper reflection of the employees' years of contribution to Boeing." Wilson testified, however, that he was not acquainted with several of the recipients (C.A. App. 644), and he therefore would not have been in a position to make an independent assessment of their past contributions to the company. Nor was Wilson given any information concerning the employees' past services. Wilson made no changes in the amounts proposed to him, except to order that petitioner Paisley's payment be reduced by a "present value" calculation, reflecting the current value to Paisley of four years' worth of supplements paid in advance. C.A. App. 19, 529-531, 536, 649, 661. Thereafter, Wilson approved a payment of $3,000 in addition to the $180,000 previously approved for Paisley (who became a government consultant pending the Senate's advice and consent to his appointment), and the additional amount was explicitly "for salary differential (difference between Gov't consulting and Boe[ing] salary)" (Gov. Exh. 111, No. 697/100165).

disgorgement of the payments by the individual petitioners and damages from petitioner Boeing in the amount of the payments. The United States contended that the payments constituted unlawful supplementations of the recipients' federal salaries, in violation of 18 U.S.C. 209(a).

The district court granted judgment in favor of petitioners (Pet. App. 16a-29a). The court first held that Section 209(a) does not prohibit any supplementation of a federal salary that is paid prior to the formal onset of the recipient's government employment (*id.* at 25a, 26a). The court further held that the payments in this case were in any event not unlawful under 18 U.S.C. 209(a), because, as the court saw it, they were intended to "sever the relationship" between Boeing and its employees, not to supplement the latters' government salaries or to compensate them for their government services (*id.* at 20a, 26a). The court accepted the government's proof that the challenged payments were made by Boeing to induce the recipients to accept federal employment and to bridge the disparity between private and public salaries; that the payments were made solely to those leaving for federal employment; and that the payments were intended by petitioner Boeing to be the equivalent of the "paid leave" it had granted to employees who work for a state or local government (*id.* at 17a-18a, 26a). But the court concluded that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (*id.* at 26a).

The district court also expressed the view that damages could not be recovered by the United States under Section 209(a) without a showing of actual corruption on the part of Boeing or the individual petitioners, which it had not shown in this case (Pet. App. 28a). Finally, in the court's view, such payments could not be recovered unless they were "secret," and it believed that the individual petitioners had made sufficient disclosures concerning the

amount of the payments to certain employees of the Department of Defense (*id.* at 27a).[6]

4. The court of appeals reversed, holding that the payments violated Section 209(a) (Pet. App. 1a-15a). The court first held, contrary to the district court's view, that payments made prior to the onset of federal service are within the reach of Section 209(a) (Pet. App. 6a-7a). The court noted that prior to 1962, the predecessor statute applied to "[w]hoever, being a Government official or employee," receives a supplementation of salary (see 18 U.S.C. 1914 (1958)), but that the limiting phrase "being a Government official or employee" was deleted when Congress enacted the present 18 U.S.C. 209 as part of the comprehensive revision of the conflict-of-interest laws in 1962. See Act of Oct. 23, 1962, Pub. L. No. 87-849, § 1(a), 76 Stat. 1125. The court also found this interpretation supported by the policies underlying Section 209 and the conflict-of-interest laws generally, which establish "rigid rules of conduct" to prevent activities that "arouse suspicions of malfeasance and corruption" and which thereby ensure that the government retains the faith of the people that is critical to "the very fabric of a democratic society" (*id.* at 6a-7a, quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)). The court ex-

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[6] The district court held that the government's claims against Boeing based on four of the five payments were barred by the three-year statute of limitations in 28 U.S.C. 2415(b) for actions founded upon a tort (Pet. App. 29a). The claims against the individual petitioners are governed by the six-year statute of limitations in 28 U.S.C. 2415(a) for actions founded upon a contract, and therefore were not time-barred. The court of appeals affirmed the district court's rulings on the statute of limitations issue, but made clear that the government could not recover from both Boeing and the individual petitioner in the case of the one payment for which recovery from Boeing was not time-barred (Pet. App. 10a-12a).

plained that "[l]arge severance payments by defense contractors to those going to work at high levels in the Defense Department certainly 'arouse suspicions,' and those suspicions are not reduced by making the payments just before government service begins" (Pet. App. 7a).

The court of appeals did not accept the government's contention that Section 209(a) sets forth an objective standard of conduct that does not include an element of intent, since Section 209(a) prohibits payments that are made "as compensation for" the recipient's federal services (Pet. App. 7a). However, the court found that the record established the requisite compensatory intent, and that the district court's contrary finding was clearly erroneous. The court relied on four factors. First, the individual recipients and Boeing personnel officials "calculated salary, benefits and cost-of-living differences over the expected term of government employment," and the Chairman of Boeing, who decided the ultimate amount, "received a recommendation and was aware of the factors used to reach that figure" (*id.* at 8a). Second, "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*ibid.*). Third, Boeing's parallel policy of providing paid leave for its employees who work for a state or local government "suggests that payments to federal employees were designed to do the same thing without technically violating § 209" (*ibid.*). Fourth, the fact that only 21 such payments had been made over the preceding 25 years, and those were made only to persons entering high-level government positions, "similarly suggests an intent to supplement the federal salaries of a limited number of employees" (*ibid.*).

The court of appeals rejected petitioners' contention that the government was not injured, and that the individual petitioners therefore were entitled to retain the

payments, because they did not result in an actual conflict of interest. The court explained that this argument "ignores the preventive nature of the conflict of interest laws," under which "the appearance of conflicts rather than actual conflicts or corruption is all that is necessary" (Pet. App. 8a-9a). In this case, the court concluded, "[t]he appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption" (*id.* at 9a).

Finally, the court rejected petitioners' reliance on a common law doctrine that only "secret" profits give rise to a conflict of interest. The court reasoned that this suit is based not on the common law, but on the statutory rule prescribed by Section 209, which is not limited to secret payments (Pet. App. 9a). Moreover, even under the common law, effective disclosure must be "formal, complete, and directed to the proper parties" (*ibid.*). Here the recipients' financial reporting forms revealed only their total income from Boeing, without separately identifying severance payments, and the court therefore found that any disclosures were "not sufficiently complete to insulate the payments from the conflict of interest laws" (*ibid.*).[7]

ARGUMENT

The payments made by petitioner Boeing and received by the individual petitioners in this case were classic violations of 18 U.S.C. 209(a): they were made solely because the individual petitioners planned to assume positions with the Department of Defense; they were intended to encour-

[7] Judge Hall dissented from the panel's holding that the payments were made and received with compensatory intent (Pet. App. 13a-15a). Petitioners' petitions for rehearing with suggestions for rehearing en banc were denied by a 6-5 vote (*id.* at 30a-31a).

age the recipients to accept those possitions; and they were calculated to supplement the recipients' federal salaries by making up the difference between their government pay and their higher pay with Boeing (as well as to defray other expenses incurred in accepting the government positions). The decision of the court of appeals, which simply requires disgorgement of those illegal payments, is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, the decision below is consistent with advice given by the Department of Justice to other agencies and prospective appointees for fifteen years. The petitions for a writ of certiorari therefore should be denied.

1. The court of appeals correctly held that the United States has a civil cause of action to recover payments made in violation of the standards of conduct established by a criminal conflict-of-interest statute. Such a statute is "evidence of the precise nature of th[e] fiduciary duty" owed to the United States by its agents (*United States* v. *Kenealy*, 646 F.2d 699, 703 (1st Cir.), cert. denied, 454 U.S. 941 (1981)), and breach of the statutory standards "will establish, as a matter of law, [the agent's] breach of fiduciary duty owed the United States." *United States* v. *Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), aff'd, 572 F.2d 31 (2d Cir. 1978). See *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961).

Section 209(a), like its predecessor, 18 U.S.C. 1914 (1958), is "framed as an absolute prohibition against double compensation for Government services." Staff of Subcomm. No. 5 of House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 44 (Comm. Print 1958). At its core, this prohibition applies to payments that have either of two characteristics. First, the statute bars payments, however denominated, that are specifically intended to induce acceptance of

federal employment. As former Assistant Attorney General Scalia explained in an opinion addressing the precise question of the application of Section 209 to severance payments, such payments may "not [be] used to induce or influence Government employment." Op. Off. Legal Counsel at 3 (Oct. 21, 1974); see also 5 Op. Off. Legal Counsel 150, 151 (1981); Op. Off. Legal Counsel at 6 (May 10, 1976).[8] Second, "the appointee's former employer cannot under this section make up the difference between his former salary and his government salary." Ass'n of the Bar of the City of New York, *Conflict of Interest and Federal Service* 65 (1960). Thus, a payment "based directly on the difference between [a private] salary and [an employee's] governmental salary * * * would be a clear violation of 209(a)." Op. Off. Legal Counsel 3 (Aug. 7, 1974);[9] see also R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137-1138 (1963) ("The most important application of the outside compensation prohibition is the typical case where a corporate executive is asked to go to Washington, and his corporation offers to pay all or part of the difference between his present salary and his future government salary.").[10]

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[8] Copies of the opinions of the Office of Legal Counsel cited in the text were included in an addendum to the government's brief in the court of appeals. The opinions of the Office of Legal Counsel have traditionally been an important source of guidance on matters of government ethics.

[9] Accord, Op. Off. Legal Counsel 4 (Dec. 17, 1976) ("Payment of the salary differential" between a government salary "and a higher corporate salary" would "clearly constitute a 'supplementation of salary' prohibited by 18 U.S.C. § 209(a).")

[10] Roswell Perkins, the author of the article cited in the text, was the chairman of the special committee of the Association of the Bar of the City of New York that conducted a comprehensive study of the federal conflict-of-interest laws, which in turn formed an important part of the basis for Congress's revision of those laws in 1962. See

The payments at issue in this case had both of these prohibited features. The district court found that the payments were made to encourage Boeing employees to accept government positions (Pet. App. 17a); the court of appeals agreed, noting that "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*id.* at 8a); and petitioners concede in this Court that the purpose of the payments was "to encourage public service by decreasing the financial penalties incurred by employees who left the employ of Boeing to enter public service" (Boeing Pet. 5; see also Individuals' Pet. 15-16). Similarly, it is undisputed that the payments in this case were calculated in large part on the basis of the difference between the recipient's Boeing salary and his lower salary with the federal government. See Pet. App. 4a, 8a, 18a, 26a. These conclusions of course are reinforced by the fact that Boeing did not have a policy of general applicability providing for severance payments to employees who left Boeing to take any of a broad range of jobs; rather, the uncontradicted evidence showed that Boeing consistently made such payments only to persons who were to assume high-level positions with the federal government—a factor that has uniformly been regarded as a ground for finding a payment barred by Section 209. 5 Op. Off. Legal Counsel 150, 151 (1981); Op. Off. Legal Counsel at 3, 5 (Sept. 15, 1977); Op. Off. Legal Counsel at 6, 7-8 (May 10, 1976); Op. Off. Legal Counsel at 3, 4-5 (Oct. 21, 1974); Perkins, 76 Harv. L. Rev. at 1139.

Conflict of Interest and Federal Service, at xii. Mr. Perkins was recognized by Congress as an important contributor to the legislative process (see H.R. Rep. No. 748, 87th Cong., 1st Sess. 8 (1961)), and the article quoted in the text is often cited as a contemporaneous and authoritative explanation of the 1962 revision.

The other principal components of the payments in this case—for moving expenses and a cost-of-living differential—were also clearly barred by Section 209(a). In fact, Congress amended 18 U.S.C. 209 in 1979 to permit a private employer to pay relocation expenses in only one narrow situation: where the recipient is a participant in a special interchange or fellowship program established by statute or Executive Order that offers appointments for a period of not to exceed one year. See 18 U.S.C. 209(e), as amended by the Act of Dec. 29, 1979, Pub. L. No. 96-174, 93 Stat. 1288. The legislative history shows that this amendment was enacted in response to an opinion of the Office of Legal Counsel that payment of moving expenses is generally prohibited by Section 209(a). See H.R. Rep. No. 674, 96th Cong., 1st Sess. 2, 5, 6, 8 (1979); 2 Op. Off. Legal Counsel 267 (1978). Although Congress carved out a special exception, it left undisturbed the general prohibition against reimbursement of moving expenses. Moreover, the legislative history makes clear that the special exception does not overcome the bar in Section 209(a) against a private employer's payment of a federal employee's "personal living expenses" (*id.* at 2-3). It necessarily follows in this case that Boeing was barred by Section 209(a) from paying a portion of the individual petitioners' personal living expenses—namely, the portion representing the cost-of-living differential. In sum, all of the principal components of the severance payments at issue in this case were clearly barred by 18 U.S.C. 209(a).

2. Notwithstanding the broad purposes of the prohibition against supplementation of a federal salary, petitioners contend (Individuals' Pet. 10-17) that any payments made prior to the time the recipient actually commences his federal employment are wholly outside the scope of Section 209(a). The court of appeals correctly rejected that contention (Pet. App. 6a-7a).

Section 209(a) provides that "[w]hoever receives any * * * supplementation of salary, as compensation for his services as an officer or employee of the executive branch," commits a criminal offense. This language requires only that the services to which the payments are tied be performed by the recipient in his capacity as a federal officer or employee. This prerequisite was amply established here. Section 209(a) is not further limited to situations in which the recipient is actually a federal officer or employee at the time the payments are made. Nor should such a limitation be read into the statutory text absent compelling indications of congressional intent, because the result would be to facilitate circumvention of the statutory bar. In any event, the legislative history establishes that Section 209(a) should not be given the self-defeating construction petitioners urge.

Before 1962, the predecessor to Section 209 (18 U.S.C. 1914 (1958)) and the predecessor to 18 U.S.C. 203 (18 U.S.C. 281 (1958)) stated that those prohibitions applied only to persons who accepted payments while "being a Government official or employee" or "being * * * [an] officer or employee of the United States." However, this limiting language was dropped from both provisions in 1962, thereby eliminating a loophole that failed to prohibit "pre-Government-employment agreements to receive compensation." *Federal Conflict of Interest Legislation* at 8, 25 (referring to Section 203); H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961); *Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 87th Cong., 1st Sess. 37 (1961). The change was "designed to provide that violation shall turn on the recipient's status at the time of * * * rendition of services, rather than on his status at the time of agreement for or receipt of compensation." *Federal Conflict of Interest Legislation* at 51; see *id.* at 22, 25 (predecessor to Section 203); *id.* at 62 (new Section 209 is to be applied "coextensively with" new Section 203). Thus, as the leading commentator on the 1962 revision observed, by virtue of this change, "[t]he time of receipt of the outside compensation is clearly irrelevant under [18 U.S.C. 209(a)], if the compensation is for the government services." Perkins, 76 Harv. L. Rev. at 1137.

Petitioners contend (Individuals' Pet. 13-14), citing *United States* v. *Muntain,* 610 F.2d 964 (D.C. Cir. 1979), and *United States* v. *Raborn,* 575 F.2d 688 (9th Cir. 1978), that "[o]ther circuits have recognized that Congress intended Section 209 to be limited to incumbent federal officials." Neither decision stands for that proposition. In *Muntain,* the court held that Section 209 was inapplicable not because the defendant was not a government employee at the time that he accepted the payments, but because the payments were for services that the recipient performed while he was on annual leave and that had no relation to his official duties. 610 F.2d at 969-960. The fact that the employee was on annual leave when he accepted the payments was cited by the court of appeals not, as petitioners state (Individuals' Pet. 14), in order to establish that the recipient must have "employee status" at the time a payment is received, but to establish that the defendant was not being paid twice for services to the government at all.

Raborn likewise did not address the issue of the timing of prohibited payments. That case involved persons who concededly were government employees (575 F.2d at 689), and the Ninth Circuit, in describing the elements of the offense in that context, simply observed that Section 209 "prohibits * * * an officer or employee of the executive branch" from receiving any supplementation of salary. 575 F.2d at 691-692. The court in no way suggested that a lump-sum payment designed to supplement an individual's federal salary, but paid immediately before he assumed his position, would be permissible under Section 209.

Petitioners suggest (Individuals' Pet. 12, 15-17), however, that the decision below is novel and warrants review because it will adversely affect the government's ability to attract individuals for top government positions. Petitioners ignore the fact that the court of appeals' holding in this case is fully consistent with the position taken by the Office of Legal Counsel over the past fifteen years in opinions rendered for various agencies and prospective appointees. See opinions cited at pages 11-12, *supra*. Those opinions make clear that severance payments such as those at issue here are clearly barred by Section 209. See also Perkins, 76 Harv. L. Rev. at 1139 n. 89. Petitioners rely (Individuals' Pet. 15) on the testimony of the former Secretary of the Navy that recruitment is made difficult by the financial disincentives involved in the acceptance of high-level government positions. Whatever the accuracy of that view as a general matter, private employers and their employees who wish to enter government service are not free to respond to that supposed problem by making payments that violate a criminal conflict-of-interest statute. Moreover, the interpretation of 18 U.S.C. 209 is the responsibility of the Attorney General, not officials of other departments and agencies.

3. Contrary to petitioner Boeing's contention (Boeing Pet. 15-17), the court of appeals correctly ruled that the amount of the illegal payments is the appropriate measure of monetary relief in this case. In a civil conflict-of-interest case, it may often be difficult to prove loss or damages in the usual sense. Significant aspects of the harm resulting from acceptance of improper payments—the injury to the reputation of public officials in the public's estimation and injury to the morale of other public employees—are unquantifiable, but nonetheless real. In such cases, therefore, this Court has not required a showing of actual loss or damage. *United States* v. *Carter*, 217 U.S.

286, 305 (1910). Instead, the value of the illegal payment is uniformly considered to be the appropriate measure of recovery. *United States* v. *Pezzello*, 474 F. Supp. 462, 463 (N.D. Tex. 1979); *Continental Management, Inc.* v. *United States*, 208 Ct. Cl. 501, 527 F.2d 613, 619 (1975). Compare *Snepp* v. *United States*, 444 U.S. 507, 514 (1980) (while damages accruing by virtue of breach of public trust are unquantifiable, nominal damages will "deter no one" and the most appropriate measure of recovery is profits accruing to the defendants by virtue of the breach). Such a sanction is appropriate because it promotes the congressional goals of "enforcing the loyalty of [the government's] agents" and of deterring future breaches of the standards established by the conflict-of-interest laws. *United States* v. *Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978).

This rule is especially appropriate under 18 U.S.C. 209, in which Congress prohibited payments designed to supplement the recipient's federal salary, without regard to whether any actual injury is shown, and did so precisely in order to prevent even an appearance of a conflict-of-interest, a subtle form of bribery (see *Muschany* v. *United States*, 324 U.S. 49, 68 (1945)), and the possibility that the recipient might be insufficiently attentive to his federal duties. See *Conflict of Interest and Federal Service* at 211-212. Moreover, the only thing that is required of the individual petitioners in this case is to disgorge the payments that Congress proscribed, plus interest. Petitioners should not be permitted to retain those illegal windfalls on the theory that no quantifiable harm was demonstrated. Nor is there any requirement that the government establish actual corruption, such as preferential treatment of Boeing in return for the payments—although documents indicate that Boeing did anticipate some type of benefit from the placement of its employees in the government

positions.[11] In any event, there is no conflict among the circuits on the issue of damages in a case such as this, and further review therefore is unwarranted.

4. The court of appeals also correctly rejected the individuals petitioners' contention (Individuals' Pet. 17-21), based on common law principles, that they should not be required to disgorge the illegal payments because they "disclosed" the payments received. This contention is without merit for two reasons. First, as the court of appeals held (Pet. App. 9a), the common law rule is inapplicable here, because this suit is based on a statute that bars

[11] A Boeing document accompanying the recommendation that petitioner Kitson receive a payment notes that his "job with the DOD is viewed as bigger than Crandon's—[and] has greater influence relative to BAC [Boeing Aerospace Company]" (C.A. App. 58). The President of Boeing Aerospace recommended a payment to petitioner Reynolds based on the fact that he "will hold a *key* job" (C.A. App. 50 (emphasis in original)). The President recommended a payment to petitioner Jones based on his view that "having someone with [Jones'] views will be helpful to us *while* he is in Washington, D.C." (C.A. App. 18 (emphasis in original)), and he stated that he would support a payment to petitioner Crandon if there was any finding that Crandon's "assignment would benefit BAC [Boeing Aerospace Company]" (Gov. Exh. 114, No. 002750/100405). Finally, Boeing documents reveal some internal doubt about whether petitioner Paisley's government appointment would be approved, and a Boeing Senior Vice President therefore recommended a payment to Paisley only "if Paisley ends up as a govt official or as consultant" (C.A. App. 40).

Contrary to Boeing's contention (Boeing Pet. 7), the government did not "stipulate" that "no actual conflict of interest occurred." Although petitioners sought to have the government stipulate that it would not contest the "fact" that the individual petitioners did not provide any preferential treatment to Boeing in return for the payments, the government refused to do so. Nevertheless, this "fact" was included in a document, not signed by the government, that was entitled "Joint Stipulations of Uncontested Facts," filed by petitioners with the district court, and included in the joint appendix on appeal (C.A. App. 330-345).

all payments made for the purpose of supplementing the salary of a federal employee, without regard to whether those payments are secret or "disclosed."

Second, even where the common law rule applies, improper payments made to an agent are recoverable by an employer if they have been retained by the agent without full disclosure. *United States* v. *Carter*, 217 U.S. at 305. The court of appeals correctly defined a full disclosure as one that is "formal, complete, and directed to the proper parties" (Pet. App. 9a, citing *United States* v. *Kenealy*, 646 F.2d at 705). The alleged "disclosures" by petitioners in this case did not meet those standards. Petitioners did not separately report the severance payments on their financial disclosure forms,[12] and they have not alleged that anyone in the Department of Defense was ever apprised that Boeing's "severance" payments were made solely to those offered federal employment for the purpose of encouraging them to accept high-level government jobs of key importance to Boeing, and that the payments were based pri-

[12] Four of the five individuals were required to file SF-278 financial disclosure forms, which are reviewed by ethics officers. The court of appeals found that none of those forms separately disclosed the severance payments (Pet. App. 9a). Petitioners argue that because the instructions for the forms did not direct them to list such payments separately from their salary and other income, their duty of full disclosure was satisfied by their aggregating the payments with other income from Boeing. Petitioners also claim that because ethics officers reviewed the completed forms, and certified that the *disclosed* information showed no potential conflict of interest, they were absolved of any liability. See Individuals' Pet. 20-21. The court of appeals correctly rejected these rationalizations. The fact that the individual petitioners complied with instructions for reporting total income on the financial disclosure forms does not mean that they brought the nature of the severance payments to the attention of appropriate government officials in a way that would enable the latter to pass on their legality.

marily on the difference between the recipient's Boeing and federal salaries.

Moreover, even if the individual petitioners' supervisors had been made fully aware of the circumstances surrounding the payments and had approved them, that action would not absolve the petitioners of liability. Section 209, unlike some other conflict-of-interest statutes, does not authorize any government official to waive its prohibitions. Compare 18 U.S.C. 208(b). As this Court stated in *Mississippi Valley Generating*, knowledge (or even approval) by a superior of a government employee's violation does not establish a waiver of a statutory standard of conduct. This is so because

> an agent's superiors may not appreciate the nature of the agent's conflict, or * * * might, in fact, share the agent's conflict of interest. The prohibition [against such waivers] was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. It is not surprising therefore that [the Court has] consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict.

364 U.S. at 561. The court of appeals' conclusion that the common law "disclosure" defense was not established here also is consistent with other appellate decisions. See, *e.g.*, *United States* v. *Kenealy, supra; United States* v. *Medico Indus., Inc.*, 784 F.2d 840, 845 (7th Cir. 1986) ("generals are not authorized to waive the application" of conflict of interest laws). This fact-bound issue does not warrant further review.

5. Finally, petitioners argue (Individuals' Pet. 22-26; Boeing Pet. 12-15) that the court of appeals misapplied the

"clearly erroneous" standard under Fed. R. Civ. P. 52(a) in reversing the district court's finding that petitioners did not intend to violate the prohibition in Section 209(a) against supplementing the recipients' salaries "as compensation for" their federal services. To the contrary, the court of appeals faithfully followed this Court's precedents, examining the entire record and concluding that the district court's factual findings were unsupported, and indeed were contradicted, by undisputed evidence in the record—including the fact that the payments were made solely to Boeing employees who were planning to accept high-level government positions, were made for the purpose of encouraging the recipients to accept such positions, and were calculated to make up the salary differential (Pet. App. 8a). This evidence conclusively establishes that the recipients' prospective federal services were the consideration for the payments, and that the payments therefore were intended "as compensation for" their federal services within the meaning of Section 209(a). See Op. Off. Legal Counsel at 4-7 (May 10, 1976).

The district court's findings, on the other hand, were based in part on a misunderstanding of the statute, since the court apparently believed that it was insufficient for the government to establish that the payments were made solely because of (and were calculated on the basis of the salary for) the recipient's government services. As a result, the district court's findings either were legally irrelevant or affirmatively demonstrated the requisite intent under the statute. See, *e.g.*, Pet. App. 17a (finding that Boeing made payments "to encourage its employees to serve their government"); *id.* at 18a (severance payments were calculated on basis of differential in financial benefits); *id.* at 26a (method of calculating payments irrelevant).

In any event, petitioners' objections to the court of appeals' review of the evidence are without merit. For ex-

ample, petitioner Boeing contends (Boeing Pet. 14) that the court of appeals "selectively disregarded other factual circumstances that specifically negate the inferences that it drew from" the method of calculation and the limitation of eligibility to those entering federal employment. Boeing relies on the district court's finding that " '[t]he severance payments made to the individual defendants were not contingent upon the individuals entering into federal government,' " and that the payments were given " 'unconditionally, no matter what [the employee] did in the future' " (Boeing Pet. 14, quoting Pet. App. 19a; see also Individuals' Pet. 5). The objective evidence of record contradicted these findings. The President of Boeing Aerospace testified that there had never been an occasion when a departing employee accepted a payment and then failed to take the government position, and he stated that he did not know what the Company would do under such circumstances (C.A. App. 635). Moreover, Boeing documents showed that it sought to make sure that the offers of federal employment would be accepted before the payment checks were issued. One document from the Executive Vice President of Boeing Aerospace states that the payment to Jones is "conditional on" Jones' "acceptance of the job" (Gov. Exh. 110, No. 570/100056). Similarly, an internal Boeing document states that company officials were concerned that Paisley's appointment would not be confirmed by the Senate and suggested that a "memo of understanding" be executed to cover a situation in which Paisley would take the payment and then simply retire (Gov. Exh. 111, No. 699-100167).[13]

[13] Petitioners also point to the testimony that the payments were designed to "avoid a conflict of interest" by "sever[ing] all * * * financial ties" with the Company (Boeing Pet. 5). The payments were not, however, necessary to sever any ties with Boeing. The individual petitioners received the value of vested and accrued benefits in separate checks that were not challenged in this case. By contrast, the individual petitioners had no pre-existing entitlement to the payments at issue here, and it therefore was not necessary for Boeing to make them, or for the individual petitioners to receive them, in order to sever ties with Boeing.

Petitioners also point to their own self-serving statements that they did not think that they were making or receiving payments that amounted to supplementations of salary as compensation for services to the government (Boeing Pet. 13-14; Individuals' Pet. 23-25). Viewing the record as a whole, however, the court of appeals found the record overwhelmingly inconsistent with those statements. This is not a case where a witness "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985). Rather, as this Court has stated (*ibid.*):

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Moreover, this Court has repeatedly held in civil cases that self-serving declarations by a party as to his intent, unsupported by any extrinsic evidence and contradicted by objective facts, may be found to be insufficient as a matter of law to justify a verdict on behalf of that party. See, *e.g.*, *United States* v. *Generes*, 405 U.S. 93, 106-107 (1972); *United States* v. *Union Pac. R.R.*, 226 U.S. 61, 92-93 (1912); *District of Columbia* v. *Murphy*, 314 U.S. 441, 449, 456 (1941). Here, the court of appeals reasonably concluded that petitioners' statements were legally insufficient and should not have been accepted as conclusive

by the district court, in the face of the objective evidence in the record.[14]

Petitioners appear to believe that any determination by a court of appeals that a district court's factual findings are "clearly erroneous" necessarily "constitutes a reweighing of evidence contrary to the requirements of Rule 52(a)" (Boeing Pet. 13). Rule 52(a), however, does not insulate factual findings from all review. On the entire record that existed in this case, the court could not help but conclude that "a mistake had been committed." *Anderson* v. *Bessemer City*, 470 U.S. at 575. In any event, the court of appeals' application of the clearly erroneous standard in the particular circumstances of this case does not warrant further review, especially since the district court's findings were infected by errors of law.

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[14] Petitioners assert (Individuals' Pet. 23) that the court of appeals did not address the trial court's finding that they had no compensatory intent in receiving the payments (Pet. App. 8a). In fact, however, the court of appeals did separately address the issue of the individuals' intent. The court specifically stated that the individual petitioners had "calculated salary, benefits and cost-of-living differences over the expected term of government employment" and submitted those calculations to Boeing (*ibid.*), thereby showing that they understood that the payments were to be made because of their federal service and on the basis of their federal salaries. The court of appeals also noted that the employees had received a separate payment for their vested benefits (*id.* at 4a), thereby refuting the individual petitioners' contention that they believed that the challenged payments were intended to compensate them for vested benefits.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

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No. 88-931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION

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The government argues that this case involves "classic violations" of 18 U.S.C. § 209. Opp. at 9. Yet, the government has admitted that this is the *first* case in which the Justice Department has sought to apply Section 209 —a criminal statute—to severance payments made to private citizens by their own employers *before* those citizens enter federal service. Moreover, the government does not deny that it is a matter of critical importance to thousands of present and potential federal employees whether the Justice Department's view, now adopted by a divided court of appeals, is correct. The votes of five of the eleven Fourth Circuit Judges in favor of rehearing *en banc* attest to the importance of that issue.

I.

1. The trial judge determined and the government conceded that it is common practice for private-sector employers to make severance payments to employees who resign and expect to take government positions. The record in this case reveals millions of dollars of such pay-

ments in recent years to hundreds of persons. JA 1073-74, 1082. According to the government, however, the line of demarcation between ethical conduct and criminal behavior is the employer's *method of calculating* the severance payment—a fact generally not known by the employee, as indeed it was not known to these petitioners.

The essence of the government's case, therefore, is that because Boeing personnel staff *considered*, among other factors, the differential between petitioners' corporate salaries and future government salaries in calculating proposed severance payments, the petitioners violated the standards of a criminal statute and subjected themselves to civil liability. Thus, in the government's view, it is permissible, for example, for the newly designated Deputy Secretary of State to receive almost $200,000 in severance pay from an international affairs consulting firm *while* he is employed as Deputy Secretary of State. *See Washington Post*, Mar. 14, 1989, p. A7, col. 1. By contrast, the government contends that it was not permissible for petitioner Crandon to receive an unconditional $40,000 severance payment while he was still employed by Boeing.

The government does not explain, however, how a potential federal employee (or his employer) is to divine this invisible line between a permissible severance payment and an unlawful one. There are no regulations governing the calculation of severance payments. The government has never before brought a civil or criminal action challenging receipt of severance payments from private-sector employers. Indeed, the trial court found that

> "Boeing has repeatedly disclosed to the United States government, including responsible officials of the Department of Defense, the fact of these payments and the circumstances under which they are made. One such disclosure letter specifically noted that severance payments were calculated with reference to the differential between the financial benefits that would accrue to the employee if he remained with Boeing, as compared with those that would accrue to the employee if he accepted the anticipated government position."
>
> "Despite actual knowledge of Boeing's practice of making severance payments, the government has never objected to the practice, and on at least one occasion informed Boeing that a proposed severance payment was in compliance with federal conflict of interest statutes." Pet. at 16a-17a.

Furthermore, petitioners complied with all applicable disclosure regulations, and several petitioners actually discussed the fact and amount of their severance payments with government officials. Pet. at 19a-20a.

This Court should resolve the uncertainty and confusion that flow from the government's arbitrary and *ad hoc* approach to this issue, an approach that casts doubt on a routine employment practice that generally has been considered not only lawful but beneficial to the public interest.

2. On the proper construction of Section 209, the government, like the Fourth Circuit, reads too much into Congress's unexplained deletion of the phrase " 'being a Government official or employee.' " Opp. at 12; *see* Pet. at 11-13. That phrase had appeared in the predecessor to Section 209 (former 18 U.S.C. § 1914), and unquestionably meant that severance payments like the ones in this case were lawful. In inferring that Congress must have intended the change in phrasing to make Section 209 applicable to unconditional severance payments received *before* entry into government service, the government ignores the only congressional explanation for the change —the statement in the committee reports that Congress was revising former Section 1914 in order to *narrow*, not expand, the statutory scope.[1] Congress's silence about

[1] The government places stock in a 1960 report of the Association of the Bar of the City of New York, *Conflict of Interest and Federal Service*. (This report was authored by Roswell Perkins, who later turned it into a law review article, also cited by the government. R. Perkins, *The New Federal Conflict-Of-Interest Law*, 76 Harv. L. Rev. 1113 (1963).) In fact, that report supports petition-

any change in the *persons* covered by new Section 209 is eloquent, however, since Congress was altering *other* sections expressly to reach payments that are made *before* the recipient enters federal service. *See* 18 U.S.C. §§ 201, 203.

Thus, it is inappropriate for the government to quote from the committee reports addressing *Section 203* of the ethics law (Opp. at 14-15) as if the reports were speaking about the differently structured Section 209. Nowhere, in fact, in any committee report is there any indication that Congress intended Section 209 to cover pre-employment severance payments. To the contrary, Congress was concerned in Section 209 solely with the "divided loyalty" of a federal employee who simultaneously receives compensation from a private source for performing his or her public duties. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. at 3 (1961); Pet. at 12. *See also* Staff of Subcomm. No. 5 of House Comm. on the Judiciary, *Federal Conflict of Interest Legislation* 44, 85th Cong., 2d Sess. (Comm. Print 1958).[2] There can

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ers on this point. Unlike the government, Mr. Perkins recognized that under Section 1914, "[i]f an employee receives no compensation from any outside source *while* he is in service, he is not affected by the section at all." *Conflict of Interest* at 64 (emphasis added). He further recognized that one of the effects of the changes made from Section 1914 to Section 209 was "to give a *greater margin of safety* to a legitimate severance payment made to the corporate executive *prior to entering government service.*" 76 Harv. L. Rev. at 1138 (emphasis added).

[2] The government's reliance on quotes from this congressional staff report also is misplaced. This report contains staff analysis only, and is not proper legislative history. Moreover, the government only cites references to Section 203, not Section 209. The staff report is silent as to whether the proposed changes in old Section 1914 would reach severance payments received before entry into government service.

The government's citation of the staff report for the proposition that Section 209 is to be applied "coextensively with" Section 203 (Opp. at 15) is misleading. The staff report simply stated that Section 209 was to "appl[y] to *legislative* and *judicial* personnel coextensively with" Section 203. *Federal Conflict of Interest Legislation* at 62 (emphasis added). The report, therefore, simply was making clear that Section 209 would apply to legislative and judicial officials as well as Executive Branch personnel. It does not suggest that Section 209 was to be expanded to cover payments received prior to becoming a government employee.

be no "divided loyalty" when, as in this case, a citizen receives from his employer, before he enters federal service, an irrevocable, unconditional lump sum payment "with no strings attached."[3]

3. Similarly, there is not one word in the statute or the legislative history to support the government's contention that Section 209 bars payments "specifically intended to induce acceptance of federal employment." Opp. at 10-11. In fact, the only support the Justice Department musters for its contention is its own informal opinions. Office of Legal Counsel opinions, however, are not intended to definitively construe the law, and, in any event, cannot constitute controlling authority. Since those opinions were unpublished, the Administrative Procedure Act forbids using them to prejudice third parties like petitioners. 5 U.S.C. § 552.

Furthermore, those Official Legal Counsel opinions do not in any consistent way support the view that a severance payment that has the collateral effect of encouraging or influencing an employee to take a federal job subjects the recipient to criminal and civil libility under Section 209(a). To the contrary, in the O.L.C. opinion of August 7, 1974 (Opp. at 11), the Justice Department declined to investigate, as a possible violation of Section 209(a), a $90,000 lump sum severance payment made by a company to an employee resigning to take a government job, even though (1) the company only gave severance payments to employees who resigned to enter public service, (2) company officials stated that the payment

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[3] The government suggests to this Court (Opp. at 22) that the payments were not unconditional, but the trial court found that the severance payments were made prior to the petitioners' entering into government service, and "were not contingent upon [their] entering into federal government service . . . ." Pet. at 18a.

was "based in part on the difference between [the employee's] income at the company and his new salary in the government" and (3) the company's express purpose was to "reduce the potential barrier to leaving [the company] by alleviating the economic hardship . . . ." Op. O.L.C. at 3-4.

In any event, the government does not deny that the *correctness* of the Justice Department's interpretations of Section 209, a criminal statute, is of utmost importance to those who leave the private sector to enter federal service and, consequently, is of utmost importance to the operation and personnel policies of the federal government.

II.

1. Although the government concedes that appropriate disclosure bars recovery under common law principles of breach of duty, it now claims that "the common law rule is inapplicable here, because this suit is based on [the] statute . . . ." Opp. at 18. The government knows that this statement is completely inaccurate. Section 209 does not itself create a civil cause of action. The government declared below that it was bringing a civil claim "under common law" for "breach of duty of loyalty," and that the case is controlled by federal common law principles. Complaint at 1, 9, 11, 13, 15, 17; JA 1001, 1002, 1004.

The government cannot have it both ways. If the government has any right to sue, it must rest on common law principles. Under the common law, disclosure of the allegedly conflicting relationship obviates any breach of the duty of loyalty. In holding otherwise, the Fourth Circuit was in conflict with this Court's holding in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and the holding of numerous other circuits. *See* Pet. at 17-18.

2. In alternatively contending that petitioners' disclosure was insufficient, the government has taken an astounding position. It is not enough for petitioners to disclose the fact and amount of their severance pay-

ments, as they did; it also is necessary, the government says, that they disclose the method by which *Boeing* calculated the payments, *even though, as the district court found, the individual petitioners did not and could not know how Boeing made those calculations,* and even though the government's very specific disclosure regulations instructed them simply to *aggregate* all payments from a single source. Pet. at 19a-20a.[4] This position is in conflict with the holding of the First Circuit in *United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 464 U.S. 941 (1981), and with long recognized common law principles.

As the government conceded in the trial court, there is *no* evidence of actual corruption in this case.[5] To the contrary, according to the district court's findings, "government supervisors of each of the individual defendants were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest." Pet. at 19a. Indeed, the trial judge expressly found that

> "Boeing never asked the individual defendants to provide it with any preferential treatment or special advantages . . . and the individuals in fact never

---

[4] In fact, petitioner Jones testified that he discussed the severance payments with his DAEO, who specifically instructed him to lump together his Boeing salary and severance payment on his SF-278 form. JA 1062-63. Similarly, the General Counsel of the Navy and Paisley's DAEO themselves amended petitioner Paisley's SF-278 disclosure to add the severance payment. JA 1036. *See also* JA 931 (Kitson). Jones and Paisley specifically discussed the "fact and amount" of the payment with DOD and Navy attorneys and senior officials and were "assured" that they could accept them. Pet. at 20a.

[5] The government disingenously protests that it did not "stipulate" that no actual conflict of interest occurred. Opp. at 16 n.11. In fact, while the government did not sign the formal pre-trial stipulation to that effect, the government conceded at trial that "we are not going to contest this . . . ." JA 339, 1012.

> provided Boeing with any such preferential treatment or special advantage." Pet. at 19a.

The court of appeals did not disturb these findings. Pet. at 8a.

It is apparent that the government's assertion that Section 209 imposes criminal and civil liability in these circumstances works a terrible injustice. The common law rule about disclosure was meant to protect individuals from the grossly unfair result that the Justice Department seeks in this case. It is imperative that this Court clarify the standards of disclosure applicable to federal employees.

III.

1. The government and the Fourth Circuit fail to distinguish between Boeing's intent as payor of allegedly illegal "compensation," and the individual petitioners' intent as recipients. The district court, "based on all the evidence before [it], including the testimony of the witnesses" (Pet. 24a), found as a fact that:

> "The severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services. *The individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries.*" Pet. at 19a (emphasis added). *See also* Pet. at 24a-25a.

While overturning as purportedly "clearly erroneous" the trial court's finding that *Boeing* lacked compensatory intent, the court of appeals did not address or disturb the district court's separate finding that the individual petitioners lacked such intent. Nevertheless, the court of appeals imposed liability on them, apparently treating their liability as flowing automatically from Boeing's.

Although the government for the most part sidesteps this issue, the government disingenuously claims in a footnote that the appeals court did in fact address the question of the individual petitioners' intent. According to the government, the court of appeals noted that their proposed severance calculations, which they had submitted to Boeing's personnel department, were in part based on salary and living cost differentials, thereby showing that they "understood that the payments were made because of their federal service." Opp. at 21 n.14. This "notation," the government contends, constituted a ruling that the district court's finding was clearly erroneous. Even if this were an accurate inference from the Fourth Circuit's casual aside, Rule 52 does not permit an appellate court implicitly to overturn a trial court's findings of fact by "noting" a single piece of evidence. The trial judge, based on the testimony, all the documentary evidence, and his assessment of the witnesses' demeanor and credibility, formally found that petitioners lacked the requisite intent. The court of appeals may not set that finding aside by a casual remark.

2. The government incorrectly claims that the record "as a whole" is inconsistent with the district court's findings and petitioners' testimony that they lacked culpable knowledge and intent. What the government obscures is that, while the individual petitioners included salary differentials in their calculations of proposed severance amounts, they also included other items such as the loss of accrued and non-vested financial benefits associated with leaving a company in mid-career. They testified that they never knew how Boeing actually calculated the payments, and there is no basis to contradict this testimony. The trial judge had the opportunity to observe the demeanor of petitioners Jones and Paisley, who testified live at the trial. The government also had the opportunity to fully cross-examine petitioners Crandon and Kitson at deposition and those depositions were admitted into evidence. The trial court evaluated this and the other evidence, and found that the "severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which

they had earned as a result of their prior service with Boeing." Pet. at 20a.[6]

Similarly, the trial court heard and observed witnesses from Boeing, who testified about the very documents cited by the government. The evidence showed that Boeing considered many factors in setting the severance payments, including the forfeiture of past benefits and the value of past service to Boeing. Based on this evidence, the trial judge found that the payments "were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services." Pet. at 19a.

This evidence is more than sufficient under Rule 52 to support the trial judge's findings about the petitioners' understanding and intent, and it cannot be simply ignored, as the court below and the government have done.

Respectfully submitted,

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[6] The government makes the misleading assertion that the petitioners' receipt of a separate check for "vested benefits" refutes their "contention that they believed that the challenged payments were intended to compensate them for vested benefits." Opp. at 21 n.14. Petitioners never claimed that the severance payments were for *vested* benefits; vested benefit payments were never an issue in this case. Rather, petitioners claimed (and the trial judge found) that they thought they were being compensated for *unvested* benefits—such as foregone pension increases, lost stock plan benefits, lost vacation rights, etc.—that would be irrevocably lost upon their resignation. Pet. at 4. Petitioners received no separate checks for those amounts.

JOINT

APPENDIX

Supreme Court, U.S.
FILED
AUG 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-931 and 88-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAWRENCE H. CRANDON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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Selected Trial Exhibits of Defendants Paisley, Jones, Reynolds, and Kitson:

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* The asterisk denotes certain trial exhibits, including bulky exhibits, exhibits containing handwritten material, or exhibits containing information in a tabular or other format that cannot be appropriately typeset. These exhibits have been separately lodged with the Clerk.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/22/86	COMPLAINT filed.
8/19/86	ANSWER filed by deft. Boeing.
8/20/86	ANSWER filed by defts. Paisley, Jones, Reynolds, and Kitson.
8/28/86	ANSWER filed by deft. Crandon.
11/20/86	JOINT STIPULATION of uncontested facts (U.S. will not sign) filed by defts.
11/20/86	MOTION for a limited re-opening of discovery filed by pltf.
11/28/86	OPPOSITION to motion for limited re-opening of discovery filed by deft. Crandon.
12/1/86	OPPOSITION to motion to reopen discovery filed by deft. Boeing.
12/1/86	OPPOSITION to motion to reopen discovery filed by defts. Jones, Paisley, Reynolds, and Kitson.
12/2/86	NOTICE returnable 12-5-86 together with MOTION to determine the sufficiency of pltf.'s answers to requests for admission and to award expenses filed by defts. Paisley, Jones, Kitson, and Reynolds.
12/12/86	OPPOSITION to motion to determine the sufficiency of pltf.'s answers to the request for admissions and for award of expenses filed by pltf.

DATE	PROCEEDINGS
12/12/86	HEARINGS ON MOTIONS: Pltf's motion to reopen discovery—denied. Defts' motion to determine the sufficiency of pltf.'s answers to requests for admission and to award expenses—denied. ORDER entered and filed.
12/23/86	NOTICE returnable 1-16-87 together with MOTION for summary judgment; STATEMENT of material facts not in dispute; MEMO.; APPENDIX—filed by pltf.
1/9/87	JOINT RESPONSE to statement of material facts with APPENDIX filed by defts.
1/9/87	NOTICE returnable 1-16-87 together with CROSS MOTIONS for summary judgment and partial summary judgment; MEMO. in support of cross motions for summary judgment and in opposition to pltf.'s motion for summary judgment; STATEMENT of material facts not in dispute; APPENDIX—filed by deft. Boeing.
1/9/87	NOTICE returnable 1-16-87 together with OPPOSITION to pltf.'s motion for summary judgment; MOTION for summary judgment; MEMO. in opposition to pltf.'s motion for summary judgment and in support of cross motion for summary judgment; STATEMENT of material facts not in dispute; APPENDIX—filed by deft. Crandon.
1/9/87	NOTICE returnable 1-16-87 together with CROSS MOTION for summary judgment; MEMO.; evidentiary APPENDIX; STATEMENT of material facts—filed by defts. Paisley, Jones, Reynolds, and Kitson.
1/15/87	REPLY memo. in support of motion for summary judgment and memo. in opposition to cross motions for summary judgment filed by pltf.
1/16/87	HEARING ON MOTIONS: Hilton, J. All motions for summary judgment—denied. ORDER entered and filed.

DATE	PROCEEDINGS
1/23/87	PROPOSED findings of fact and conclusions of law filed by pltf.
1/23/87	MOTION *in limine* with MEMO. in support filed by pltf.
1/27/87	OPPOSITION to motion *in limine* to exclude evidence related to intent filed by deft. Crandon.
1/27/87	OPPOSITION to motion *in limine* filed by defts. Paisley, Jones, Reynolds, and Kitson.
1/27/87	STIPULATION re claim against deft. Reynolds filed by the parties.
1/27/87	TRIAL PROCEEDINGS: Hilton, J. Matter came on for trial by Court. Counsel and parties appeared (except for 2 defendants). Opening statements made. Pltf. adduced evidence and rested. Motions for directed verdict as to all defts., both individual and corporate, taken under advisement. Defts. adduced evidence and rested. Closing arguments heard. Court took matter under advisement.
2/17/87	MEMORANDUM OPINION and ORDER in accordance with opinion that judgment is entered on behalf of the defts. and the case is dismissed.
4/15/87	NOTICE OF APPEAL from the final judgment of 2-17-87 filed by pltf.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/20/87	Civil case docketed.
4/23/87	Record on appeal filed.
6/16/87	MOTION by individual Appellees Crandon, Kitson, Reynolds, Jones, and Paisley to file brief separate from the one to be filed by Boeing.
6/17/87	CLERK ORDER granting motion to file separate briefs, and granting motion to extend time to file brief until July 22, 1987.
7/22/87	BRIEF received without filing from Appellant due to attachment to brief.
7/22/87	JOINT APPENDIX filed by Appellant.
7/29/87	MOTION by Appellant to allow attachment of Letter Opinions of Office of Legal Counsel and Office of Government Ethics to Appellant's opening brief as a supplement.
8/3/87	RESPONSE to motion to allow attachment to brief filed by individual Appellees.
8/3/87	MOTION filed by individual Appellees to allow attachment to brief as a supplement.
8/6/87	RESPONSE to motion to allow attachment to brief filed by Appellee Boeing.
8/14/87	RESPONSE to motion to allow attachment to brief filed by Appellant.
8/18/87	CLERK ORDER granting motions to allow attachments to brief.
8/18/87	BRIEF filed by Appellant.

DATE	PROCEEDINGS
9/8/87	BRIEF filed by individual Appellees.
9/8/87	BRIEF filed by Appellee Boeing.
9/21/87	REPLY BRIEF filed by Appellant.
12/3/87	Oral argument heard.
5/5/88	OPINION filed. Decision: affirmed in part, reversed and remanded in part. Judgment order filed.
5/19/88	PETITION filed by individual Appellees for rehearing and suggestion for rehearing *en banc*.
5/20/88	PETITION filed by Appellee Boeing for rehearing and suggestion for rehearing *en banc*.
8/1/88	RESPONSE to motion for rehearing, and suggestion for rehearing *en banc* filed by Appellant.
8/5/88	MOTION filed by individual Appellees for leave to file reply memorandum in support of petition for rehearing and suggestion for rehearing *en banc*, with proposed MEMO.
8/23/88	ORDER granting motion for leave to file reply in support of petition for rehearing and suggestion for rehearing *en banc*.
9/7/88	ORDER denying all motions for rehearing and suggestion for rehearing *en banc*.
9/14/88	Mandate issued.
12/14/88	Supreme Court notice received of filing of PETITION FOR CERTIORARI on 12/05/88. Supreme Court No. 88-931.
12/19/88	Supreme Court notice received of filing of PETITION FOR CERTIORARI on 12/06/88. Supreme Court No. 88-938.

DATE	PROCEEDINGS
4/6/89	ORDER (filed 4/3/89) granting petition for certiorari. Supreme Court No. 88-931.
4/6/89	ORDER (filed 4/3/89) granting petition for certiorari. Supreme Court No. 88-938.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-0829A

UNITED STATES OF AMERICA,
Plaintiff

v.

THE BOEING COMPANY, INC.,
MELVYN R. PAISLEY, THOMAS K. JONES,
HERBERT A. REYNOLDS, HAROLD KITSON, JR.
and LAWRENCE H. CRANDON,
Defendants.

COMPLAINT

Count I

1. This is a civil action brought by Plaintiff, the United States of America, against Defendant The Boeing Company, Inc. to recover at common law its damages resulting from the defendant having made certain severance payments to five of its employees who retired or resigned from their employment to accept employment with the United States in key positions within the Department of Defense and the Department of the Navy. The payments were made under circumstances which created a conflict of interest situation, giving rise to and inducing a breach of the fiduciary duty of undivided loyalty that each employee owed the United States as his employer.

2. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

3. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b).

4. Defendant The Boeing Company (hereinafter "Boeing") is a corporation organized and existing under the laws of the State of Delaware. Boeing's corporate headquarters are located at 7755 East Marginal Way South, Seattle, Washington; it maintains an office and conducts business within the geographical limits of the jurisdiction of this court. Boeing is one of this nation's largest defense contractors, and has contracts to provide goods and services to the Department of Defense, and all of the armed services, including the Department of the Navy.

5. Defendant Melvyn R. Paisley is a resident of the State of Virginia. Prior to October 1, 1981, he was an employee of Boeing. On or about October 1, 1981, Defendant Paisley retired from his private employment to accept employment with the United States. On or about December 2, 1981, Defendant Paisley began his employment with the United States as Assistant Secretary of the Navy for Research, Engineering & Systems within the geographical limits of the jurisdiction of this court.

6. Defendant Thomas K. Jones, also known as T.K. Jones, is a resident of the State of Washington. Prior to May 1, 1981, he was an employee of Boeing. On or about May 1, 1981, Defendant Jones resigned from his private employment to accept employment with the United States. On or about June 1, 1981, Defendant Jones began his employment with the United States as Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces within the geographical limits of the jurisdiction of this court.

7. Defendant Herbert A. Reynolds is a resident of the State of Washington. Prior to July 22, 1981, he was an employee of Boeing. On or about July 22, 1981, defendant Reynolds resigned from his private employment to accept employment with the United States. Subsequent to that date, Defendant Reynolds began his employment

with the United States as Deputy Director of Space and Intelligence Policy in the Office of the Under Secretary of Defense for Policy within the geographical limits of the jurisdiction of this court.

8. Defendant Harold Kitson, Jr. is a resident of the State of Virginia. Prior to July 31, 1982, he was an employee of Boeing. On or about July 31, 1982, defendant Kitson retired from his private employment to accept employment with the United States. Subsequent to that time, defendant Kitson began his employment with the United States as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence within the geographical limits of the jurisdiction of this court.

9. Defendant Lawrence H. Crandon currently resides overseas. Prior to March 2, 1982, he was an employee of Boeing. On or about March 2, 1982, defendant Crandon resigned from his private employment to accept employment with the United States. Subsequent to that time, upon information and belief, defendant Crandon began his employment with the United States within the geographical limits of the jurisdiction of this court and was assigned to the North Atlantic Treaty Organization (NATO) Air Command and Control System Team. (Hereinafter defendants Paisley, Jones, Reynolds, Kitson and Crandon will sometimes be referred to as the individual defendants.)

10. Each of the individual defendants was offered and accepted employment with the United States while he was an employee of Boeing. After he determined to accept employment with the United States, each individual defendant informed Boeing of his decision. After Boeing was informed by each individual defendant of his decision to accept United States Government employment, Boeing informed each individual defendant that he might receive a payment upon termination of his private em-

ployment. Boeing then requested each of the individual defendants to present to Boeing an estimate of the pay and benefits which he would lose as a result of accepting United States Government employment, which would be, and was in fact, used by Boeing in determining the amount of the payment made to each employee.

11. At the time each individual employee left his private employment, Boeing made a lump sum payment to him. Boeing has called said payments "terminal pay" or "severance payments." (Hereinafter said payments will be referred to as "payments" or "severance payments.")

12. The severance payments made to the individual defendants were not made pursuant to a severance payment policy applicable to all Boeing employees. Rather, the payments were made pursuant to a policy which was completely discretionary with the management of Defendant Boeing, and which was limited in its application to employees terminating their employment to accept employment with the United States Government; even then, the policy was further limited to those accepting only certain key positions.

13. (a) The amount of the severance payments made to the individual defendants was not determined by Boeing solely in consideration of the past service of each employee. Rather, computation of the amount paid to each employee was based almost exclusively on prospective factors involving the difference between the pay and benefits that each man would receive if he remained with Boeing and the pay and benefits he would receive as an employee of the United States.

(b) Factors used in the various computations were 1) the difference in base salary between that paid by Boeing and that paid by the Government, 2) the amounts the employees would not be paid by Boeing as part of various Boeing savings, stock bonus, and other employee

benefit plans, and 3) a differential based on United States Bureau of Labor Statistics data of the higher cost of living in the Washington, D.C. area as compared to that in the Seattle, Washington area.

(c) The yearly amount figured for each of the factors mentioned in subparagraph 13(b) above, applicable to each employee, was mulitplied by the number of years that Boeing expected the employee to serve in the Government through the end of the then current Presidential term. In some instances this time was referred to as the employee's "assignment" or his "tour" with the Government. In most cases, the employees began their employment early in the Presidential term and the multiplier was set at or near four; however, employees who were hired later received a proportionate reduction in the multiplier based on the time remaining in the Presidential term.

(d) For defendants Paisley, Jones, and Kitson the computation also included a fourth factor: costs associated with relocation and moving to Washington, D.C. which are not reimbursable by the Government.

14. Based upon the policy described above, Defendant Boeing made payments totaling $485,000 to the individual defendants in the following amounts on or about the following dates:

Melvyn R. Paisley	$183,000	October 1, 1981
Thomas K. Jones	132,000	May 1, 1981
Herbert A. Reynolds	80,000	July 22, 1981
Harold Kitson, Jr.	50,000	July 31, 1982
Lawrence H. Crandon	40,000	March 5, 1982

15. Each of the payments described in paragraph 14 above was wrongly and unlawfully included in one of the general and administrative overhead pools used by Boeing and the United States to determine compensation due to Boeing under Government contracts. As a result of the inclusion of the severance payments in the overhead computations, the overhead rate applicable to pay-

ments to Boeing by the Government was increased, which resulted, in part, in the Government reimbursing Boeing for a portion of the severance payments. Through subsequent administrative withholding, however, the Government implemented a change in the overhead rate and effectively recouped the proportionate amount of the actual severance payments which had been paid by the Government. However, upon information and belief, the increase in the overhead rate caused the Government to pay inflated amounts of overhead payments during the time that the severance payments were included in Boeing's overhead computations. Boeing was and has been unjustly enriched by its receipt and retention of the inflated payments, and the Government has been damaged thereby.

16. By making the payments to the individual defendants pursuant to the policy described above, based on considerations not associated with past employment, but upon prospective considerations of the difference between the pay and benefits which each individual defendant would receive as an employee of Boeing and those he would receive as an employee of the United States, the effect of which was to supplement each individual defendant's compensation as a federal employee, Boeing created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty with each individual defendant owed to the United States, as measured by 18 U.S.C. § 209 and/or the common law.

WHEREFORE, Plaintiff, United States of America, prays,

A. That judgment be entered in plaintiff's favor and against defendant The Boeing Company in the total amount of the severance payments made to the individual defendants, $485,000, plus interest at the Treasury's current value of funds rate appropriate to each payment from the date of each such payment until the date of judgment;

B. That judgment be entered against the defendant The Boeing Company in an amount, yet to be determined, which the Government paid to The Boeing Company as a result of the inclusion of the severance payments in The Boeing Company's overhead computations, plus interest at the Treasury's appropriate current value of funds rate from the date each payment to the defendant based on the inflated overhead rate was made;

C. That the costs of this action be taxed against the defendant; and

D. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Count II

17. This is an action brought by Plaintiff United States of America at common law to recover monies received by the defendant Melvyn R. Paisley in contravention of his fiduciary duty to the United States, as well as the proceeds of said monies, for an accounting of those monies and their proceeds, and for the imposition of a constructive trust.

18. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

19. Plaintiff repeats and realleges each allegation in paragraphs 3 through 5, and 10 through 16 above, as if fully set forth herein.

20. By accepting the severance payment made by Boeing in the amount of $183,000, and by continuing to hold said severance payment or its proceeds, defendant Paisley has breached the fiduciary duty of undivided loyalty he owes to the United States to keep himself free from conflicts of interest, as that duty is measured by 18 U.S.C. § 209 and/or the common law.

21. Defendant Paisley has been unjustly enriched by said payment and the proceeds therefrom, is liable to

account to the United States for that payment and its proceeds, and holds said payment and its proceeds in constructive trust for the United States.

WHEREFORE, Plaintiff, the United States of America, prays,

A. That judgment be entered in favor of the United States and against Defendant Melvyn R. Paisley for the total amount of the severance payment made to him by The Boeing Company;

B. That judgment be entered against defendant Melvyn R. Paisley requiring him to account to the United States for the payment he received from The Boeing Company, and all of its proceeds;

C. That judgment be entered against defendant Melvyn R. Paisley declaring that the payment he received from The Boeing Company and any proceeds therefrom is rightfully the property of the United States, and that he holds said payment and any proceeds therefrom in trust for the use and benefit of the United States, and that such judgment order that any such payment or proceeds therefrom now in the hands of the defendant be transferred to the United States, and that the defendant be held liable to the United States for any costs, including court costs and attorneys fees, incurred by the United States in recovering said payment or its proceeds now held by the defendant or transferred by him to any third party.

D. That the costs of this suit be taxed against the defendant, and;

E. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Count III

22. This is an action brought by Plaintiff United States of America at common law to recover monies received by the defendant Thomas K. Jones, also known as

T.K. Jones, in contravention of his fiduciary duty to the United States, as well as the proceeds of such monies, for an accounting of those monies and their proceeds, and for the imposition of a constructive trust.

23. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

24. Plaintiff repeats and realleges each allegation in paragraphs 3, 4, 6 and 10 through 16 above, as if fully set forth herein.

25. By accepting the severance payment made by Boeing in the amount of $132,000, and by continuing to hold said severance payment or its proceeds, defendant Jones breached the fiduciary duty of undivided loyalty he owed to the United States to keep himself free from conflicts of interest, as that duty is measured by 18 U.S.C. § 209 and/or the common law.

26. Defendant Jones has been unjustly enriched by said payment and the proceeds therefrom, is liable to account to the United States for that payment and its proceeds, and holds said payment and its proceeds in constructive trust for the United States.

WHEREFORE, Plaintiff, the United States of America, prays,

A. That judgment be entered in favor of the United States and against Defendant Thomas K. Jones for the total amount of the severance payment made to him by The Boeing Company;

B. That judgment be entered against defendant Thomas K. Jones requiring him to account to the United States for the payment he received from The Boeing Company, and all of its proceeds;

C. That judgment be entered against defendant Thomas K. Jones declaring that the payment he received from The Boeing Company and any proceeds therefrom

is rightfully the property of the United States, and that he holds said payment and any proceeds therefrom in trust for the use and benefit of the United States, and that such judgment order that any such payment or proceeds therefrom now in the hands of the defendant be transferred to the United States, and that the defendant be held liable to the United States for any costs, including court costs and attorneys fees, incurred by the United States in recovering said payment or its proceeds now held by the defendant or transferred by him to any third party.

D. That the costs of this suit be taxed against the defendant, and;

E. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Count IV

27. This is an action brought by Plaintiff United States of America at common law to recover monies received by the defendant Herbert A. Reynolds, in contravention of his fiduciary duty to the United States, as well as the proceeds of said monies, for an accounting of those monies and their proceeds, and for the imposition of a constructive trust.

28. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

29. Plaintiff repeats and realleges each allegation in paragraphs 3, 4, 7, and 10 through 16 above, as if fully set forth herein.

30. By accepting the severance payment made by Boeing in the amount of $80,000, and by continuing to hold said severance payment or its proceeds, defendant Reynolds breached the fiduciary duty of undivided loyalty he owed to the United States to keep himself free from

conflicts of interest, as that duty is measured by 18 U.S.C. § 209 and/or the common law.

31. Defendant Reynolds has been unjustly enriched by said payment and the proceeds therefrom, is liable to account to the United States for that payment and its proceeds, and holds said payment and its proceeds in constructive trust for the United States.

WHEREFORE, Plaintiff, the United States of America, prays,

A. That judgment be entered in favor of the United States and against Defendant Herbert A. Reynolds for the total amount of the severance payment made to him by The Boeing Company;

B. That judgment be entered against defendant Herbert A. Reynolds requiring him to account to the United States for the payment he received from The Boeing Company, and all of its proceeds;

C. That judgment be entered against defendant Herbert A. Reynolds declaring that the payment he received from The Boeing Company and any proceeds therefrom is rightfully the property of the United States, and that he holds said payment and any proceeds therefrom in trust for the use and benefit of the United States, and that such judgment order that any such payment or proceeds therefrom now in the hands of the defendant be transferred to the United States, and that the defendant be held liable to the United States for any costs, including court costs and attorneys fees, incurred by the United States in recovering said payment or its proceeds now held by the defendant or transferred by him to any third party.

D. That the costs of this suit be taxed against the defendant, and;

E. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Count V

32. This is an action brought by Plaintiff United States of America at common law to recover monies received by the defendant Harold Kitson, Jr. in contravention of his fiduciary duty to the United States, as well as the proceeds of said monies, for an accounting of those monies and their proceeds, and for the imposition of a constructive trust.

33. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

34. Plaintiff repeats and realleges each allegation in paragraphs 3, 4, 8 and 10 through 16 above, as if fully set forth herein.

35. By accepting the severance payment made by Boeing in the amount of $50,000, and by continuing to hold said severance payment or its proceeds, defendant Kitson breached the fiduciary duty of undivided loyalty he owed to the United States to keep himself free from conflicts of interest, as that duty is measured by 18 U.S.C. § 209 and/or the common law.

36. Defendant Kitson has been unjustly enriched by said payment and the proceeds therefrom, is liable to account to the United States for that payment and its proceeds, and holds said payment and its proceeds in constructive trust for the United States.

WHEREFORE, Plaintiff, the United States of America, prays,

A. That judgment be entered in favor of the United States and against Defendant Harold Kitson, Jr. for the total amount of the severance payment made to him by The Boeing Company;

B. That judgment be entered against defendant Harold Kitson, Jr. requiring him to account to the

United States for the payment he received from The Boeing Company, and all of its proceeds;

C. That judgment be entered against defendant Harold Kitson, Jr. declaring that the payment that he received from The Boeing Company and any proceeds therefrom is rightfully the property of the United States, and that he holds said payment and any proceeds therefrom in trust for the use and benefit of the United States, and that such judgment order that any such payment or proceeds therefrom now in the hands of the defendant be transferred to the United States, and that the defendant be held liable to the United States for any costs, including court costs and attorneys fees, incurred by the United States in recovering said payment or its proceeds now held by the defendant or transferred by him to any third party.

D. That the costs of this suit be taxed against the defendant, and;

E. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Count VI

37. This is an action brought by Plaintiff United States of America at common law to recover monies received by the defendant Lawrence H. Crandon in contravention of his fiduciary duty to the United States, as well as the proceeds of said monies, for an accounting of those monies and their proceeds, and for the imposition of a constructive trust.

38. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

39. Plaintiff repeats and realleges each allegation in paragraphs 3, 4 and 10 through 16 above, as if fully set forth herein.

40. By accepting the severance payment made by Boeing in the amount of $40,000, and by continuing to hold said severance payment or its proceeds, defendant Crandon has breached the fiduciary duty to undivided loyalty he owes to the United States to keep himself free from conflicts of interest, as that duty is measured by 18 U.S.C. § 209 and/or the common law.

41. Defendant Crandon has been unjustly enriched by said payment and the proceeds therefrom, is liable to account to the United States for that payment and its proceeds, and holds said payment and its proceeds in constructive trust for the United States.

WHEREFORE, Plaintiff, the United States of America, prays,

A. That judgment be entered in favor of the United States and against Defendant Lawrence H. Crandon for the total amount of the severance payment made to him by The Boeing Company;

B. That judgment be entered against defendant Lawrence H. Crandon requiring him to account to the United States for the payment he received from The Boeing Company, and all of its proceeds;

C. That judgment be entered against defendant Lawrence H. Crandon declaring that the payment he received from The Boeing Company and any proceeds therefrom is rightfully the property of the United States, and that he holds said payment and any proceeds therefrom in trust for the use and benefit of the United States, and that such judgment order that any such payment or proceeds therefrom now in the hands of the defendant be transferred to the United States, and that the defendant be held liable to the United States for any costs, including court costs and attorneys fees, incurred by the United States in recovering said payment or its proceeds now held by the defendant or transferred by him to any third party.

D. That the costs of this suit be taxed against the defendant, and;

E. That plaintiff be granted such other and further relief as the Court shall deem just and proper.

Respectfully submitted,

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Assistant Attorney General

HENRY E. HUDSON
United States Attorney

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JOSEPH A. FISHER III
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Date: July 22, 1986

[The following document, entitled "Joint Stipulations of Uncontested Facts," was introduced in the district court as *proposed stipulations* by *the defendants*, and was *not* signed by the United States. *See* JA 137-41. At trial, the United States did agree to most of the proposed stipulations, but did *not* agree to Numbers 104, 105, 114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 127, 128, 136, 137, 138, 142, 144, 145, 146, 152, 153. *See* Trial Transcript at JA 140-41.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

JOINT STIPULATIONS OF UNCONTESTED FACTS

I. *Joint Stipulations of Fact*

1. Boeing is a corporation organized and existing under the laws of the State of Delaware. Boeing's corporate headquarters are located at 7755 East Marginal Way South, Seattle, Washington. Boeing maintains an office and conducts business within the geographical limits of the jurisdiction of this Court.

2. Boeing has contracts to provide goods and services to the Department of Defense, and all of the armed services, including the Department of the Navy.

3. Individuals who have developed technical expertise through their jobs in private industry can make vital contributions to the government in the area of the national defense.

4. The Defense Department and the armed services regularly seek the cooperation of private industry in encouraging qualified individuals to accept government positions.

5. During the period 1962 to 1982, Boeing made at least twenty-one severance payments to persons who terminated their employment with Boeing in order to enter government service.

6. In 1973, Frank A. Shrontz resigned his position with Boeing in order to accept an appointment as an

Assistant Secretary of the Air Force. In the course of consideration of his appointment, the isssue of possible severance payments arose.

7. By letter dated June 3, 1971, the Defense Contract Audit Agency ("DCAA"), the unit of the Department of Defense primarily responsible for overseeing the financial activities of government contractors, requested data regarding severance payments and other compensation payments made to certain Boeing employees who terminated their employment during the period 1967 through 1970.

8. Boeing responded to questions raised by an Air Force contracting officer in a letter dated October 1, 1971, which discussed its severance payment policy.

9. In 1972, DCAA reviewed Boeing's overhead claim for 1970. In a response dated January 9, 1973 to DCAA's audit report, Boeing described its position with regard to a severance payment which had been noted by the auditors.

10. Boeing sent a memorandum to the Air Force Contracting Officer and DCAA dated April 6, 1973 in which it commented on DCAA's audit of Boeing's overhead costs. This memorandum sets forth, *inter alia*, DCAA's question regarding severance payments and Boeing's reply.

11. Boeing replied to DCAA's request of January 12, 1982 by memorandum dated February 17, 1982.

12. By an Action Item Request dated December 21, 1982, DCAA requested information from Boeing concerning severance payments made in 1982.

13. Boeing has advised both the Department of Defense and the Department of Justice of its willingness to conform its severance payment practices and policies to any reasonable standards the government may adopt.

14. T.K. Jones ("Jones") is a resident of the State of Washington.

15. Jones was born on June 30, 1932, in Tacoma, Washington.

16. Jones received a B.S. in Mechanical Engineering in 1954 from the University of Washington.

17. Jones joined Boeing in 1954 as a design engineer working on the B-52 bomber.

18. Jones worked at Boeing on a variety of military and space programs, including the manned space glider, the manned orbiting laboratory, space satellites and the Minute-Man Inter-Continental Ballistic Missile.

19. In mid-June 1971, Jones was offered and accepted the position of Senior Technical Adviser to the Honorable Paul Nitze, Assistant to the Secretary of Defense for Arms Control.

20. Jones served the United States honorably and faithfully as a member of the government's SALT team from 1971 to 1974.

21. After completing his SALT service, Jones resigned and returned to Boeing in 1974 as Program and Product Evaluation Manager.

22. While Jones was employed by Boeing during the period from 1974 to 1981, he was retained as a consultant to various Defense Department officials and agencies, including the Defense Science Board and the Department of Defense's Civil Preparedness Office, and was appointed a member of the National Defense Executive Reserve at the Department of Commerce.

23. In early 1981, Jones was contacted by Dr. Richard D. DeLauer, Under Secretary of Defense for Research and Engineering, and Dr. James P. Wade, Jr., Dr. DeLauer's Principal Deputy Under Secretary of Defense. Jones was urged to consider accepting the position of

Deputy Under Secretary for Strategic and Theater Nuclear Forces.

24. In early March 1981, Jones met with various Defense Department officials to discuss the proposed position.

25. Before he was appointed Deputy Under Secretary of Defense, Jones submitted documents to Boeing showing that the financial cost to him of separating from Boeing would amount to at leasst $175,815.

26. At the time Jones received the severance payment from Boeing, he had not secured, and was not guaranteed, his appointment as Deputy Under Secretary of Defense, and the United States had assumed no employment obligations to Jones with respect to that appointment.

27. In September 1982, an agent of the FBI interviewed Jones as to the nature of the severance payment he had received.

28. Jones cooperated with government investigators who were inquiring into the circumstances surrounding his receipt of a severance payment from Boeing in 1981.

29. In 1983, Jones executed an affidavit regarding his severance payment, which was submitted to the Department of Justice in July 1984.

30. After a full background investigation, Jones obtained the highest security clearances, including compartmented clearances, and he retained those clearances throughout his public service.

31. On or about June 1, 1981, Jones began his service to the United States as Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces within the geographical limits of the jurisdiction of this Court.

32. On or about September 16, 1982, Jones signed a statement of disqualification from any actions that could in any way affect Boeing.

33. Jones' superiors in the Defense Department were and are fully satisfied that Jones capably, faithfully and honorably performed his public duties without bias and with independence and impartiality.

34. Melvyn R. Paisley ("Paisley") is a resident of the Commonwealth of Virginia.

35. Paisley was born on October 9, 1924, in Portland, Oregon.

36. Paisley received a B.S. in Electrical Engineering from the American Institute of Technology in 1951 and subsequently did graduate work at Massaschusetts Institute of Technology.

37. Paisley joined Boeing as an engineer in January 1954.

38. In his approximately 28 years with the Company, Paisley rose through the ranks of Boeing to become Manager of International Operations for the Boeing Aerospace Company and Vice President of the Boeing International Corporation.

39. In or around May 1981, Paisley was contacted by Captain J.E. Gordon (U.S.N.), Special Assistant to the Secretary of the Navy, regarding the position of Assistant Secretary of the Navy for Research, Engineering and Systems.

40. After discussions with Paisley, the Secretary of the Navy, John F. Lehman, recommended that the President of the United States nominate Paisley to be Assistant Secretary of the Navy.

41. Before his appointment as Assistant Secretary of the Navy, Paisley submitted documents to Boeing showing that the financial cost to him of separating from Boeing would be approximately $825,000, including approximately $77,000 in lost stock options and $250,000 in lost retirement benefits.

42. By check dated September 30, 1981, before Paisley was appointed as Assistant Secretary of the Navy, Boeing made a severance payment to him of $183,000, less withholding tax.

43. At the time Paisley received the severance payment from Boeing, he had not secured, and was not guaranteed, his appointment as Assistant Secretary of the Navy, and the United States had assumed no employment obligations to Paisley with respect to that appointment.

44. Paissley was confirmed by the United States Senate on November 23, 1981 and sworn in on or about December 2, 1981 as Assistant Secretary of the Navy for Resesarch, Engineering and Systems within the geographical limits of the jurisdiction of this Court.

45. In September 1982, two agents of the FBI interviewed Paisley at his home as to the nature of the severance payment he had received.

46. Paisley cooperated with government investigators who were inquiring into the circumstances surrounding his receipt of a severance payment from Boeing in 1981.

47. In 1984, Paisley executed an affidavit regarding his severance payment. A true and correct copy of this affidavit, which is attached hereto as Attachment T, was submitted to the Department of Justice in July 1984.

48. Paisley's receipt of the severance payment has been known to responsible officials of the Defense Department and of the Justice Department since at least 1982.

49. After a full background investigation, Paisley was given the highest security clearances, including compartmented clearances.

50. Paisley's superiors are fully satisfied that Paisley capably, faithfully and honorably has performed his public duties without bias and with independence and impartiality.

51. Paisley has served continuously as Assistant Secretary of the Navy from December 2, 1981, to the present.

52. Herbert A. Reynolds ("Reynolds") is a resident of the State of Washington.

53. Reynolds was born on March 5, 1922, in New York, New York.

54. Reynolds joined the United States Army Air Corps on June 17, 1942, and graduated from the Army Flying School.

55. Before the government approved his appointment to the position that he was willing to accept, Reynolds submitted documents to Boeing showing that the financial cost to him of separating from Boeing would be $194,518, including forfeiture of $42,000 in military pension rights and $16,500 in lost investment plan rights.

56. On July 22, 1981, before Reynolds was appointed to any government position, Boeing made a severance payment to him of $80,000, less withdrawing tax.

57. At the time Reynolds received the severance payment from Boeing, he had not secured, and was not guaranteed, his appointment as Deputy Director of Space and Intelligence Policy, and the United States had assumed no employment obligations to Reynolds with respect to that appointment.

58. In the fall of 1982, two agents of the FBI interviewed Reynolds at his apartment concerning the severance payment he had received.

59. Reynolds cooperated with government investigators who were inquiring into the circumstances surrounding his receipt of a severance payment from Boeing in 1981.

60. In October 1983, Reynolds executed an affidavit regarding his severance payment. That affidavit was submitted to the Justice Department in July 1984.

61. Reynolds' receipt of a severance payment from Boeing has been known to responsible officials of the Defense Department and of the Justice Department since at least 1982.

62. After a full background investigation, Reynolds was appointed to the position of Deputy Director of Space and Intelligence Policy on or about October 4, 1981.

63. After full background investigation, Reynolds was given the highest security clearances as well as additional compartmented clearances, and he retained those clearances throughout his government service.

64. In or about September 1982, Reynolds signed a statement of disqualification from any actions that could in any way affect Boeing.

65. Reynolds' superiors were and are fully satisfied that Reynolds capably, faithfully and honorably performed his public duties without bias and with independence and impartiality.

66. In recognition of his outstanding service, the Secretary of Defense awarded Reynolds the "Secretary of Defense Meritorious Civilian Service Award."

67. In a March 1984 Progress Review of Reynolds, Deputy Under Secretary of Defense General Stilwell evaluated Reynolds' performance as follows:

> "The United States of America owe much to Herb Reynolds. He has a knowledge of and perspective on the military potential of outer space that is equalled by only a handful of individuals and exceeded by none. Despite severe health problems, he has labored inordinately long hours, without respite, on matters of extraordinary sensitivity and substantive import —all relating to the nation's policy and posture in space. His output has been of such consistently high quality that it has invariably been endorsed by the

> Secretary of Defense. As my counsellor on all aspects of space policy, his advice has been totally relevant to any problem at hand, constructive, timely and fully useful. Combined with his consummate mastery of his field, are personal attributes which command my respect: mental toughness, forthrightness, stout advocacy of his convictions, and utter dependability when the going gets rough. He is 100% professional!"

68. Harold Kitson, Jr. ("Kitson") is a resident of the State of Washington.

69. Kitson was born on January 1, 1925, in Chestnut Hill, Pennsylvania.

70. Kitson graduated from Lehigh University with a B.S. in Electrical Engineering in 1950.

71. In April 1982, Kitson was contacted by Assistant Secretary of the Navy Melvyn Paisley to determine if he would consider accepting an appointment as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence ("C3I").

72. Before he was appointed to any government position, Kitson submitted documents to Boeing showing that the financial cost to him of separating from Boeing would be approximately $180,000, including approximately $74,000 in lost retirement benefits and approximately $49,000 in lost stock options and investment plan rights.

73. Prior to leaving Boeing's employ, Kitson was told that Boeing would make a severance payment to him of $50,000.

74. By check dated July 27, 1982, before Kitson was appointed to his government position, Boeing made a severance payment to him of $50,000, less withholding tax.

75. At the time Kitson received the severance payment from Boeing, he had not secured, and was not guaranteed,

his appointment as Deputy Assistant Secretary of the Navy, and the United States had assumed no employment obligations to Kitson with respect to that appointment.

76. Kitson cooperated with government investigators who were inquiring into the circumstances surrounding his receipt of a severance payment from Boeing.

77. In January 1984, Kitson executed an affidavit regarding his severance payment. That affidavit was submitted to the Justice Department in July 1984.

78. Kitson's receipt of the severance payment from Boeing has been known to responsible officers of the Defense Department and of the Justice Department since at least 1982.

79. After full background investigation, Kitson was given the highest security clearances, as well as additional compartmental clearances, and he retained these clearances throughout his government service.

80. Kitson served as a consultant to the Defense Department from August 2, 1982 until September 1982.

81. In September 1982, after a background investigation, Kitson was appointed Deputy Assistant Secretary of the Navy for C3I within the geographical limits of the jurisdiction of this Court.

82. At all times, Kitson's superiors knew of his previous Boeing employment.

83. On or about September 27, 1982, Kitson submitted a letter to Assistant Secretary Paisley disqualifying himself from working on matters related to Boeing during his term of government service. Kitson was disqualified from working on Boeing-related matters during the entire period of his government employment.

84. Kitson's superiors were and are fully satisfied that Kitson capably, faithfully and honorably performed his

public duties wthout bias and with independence and impartiality.

85. Lawrence H. Crandon was born on April 6, 1924, and is now a resident of Brussels, Belgium.

86. He received his B.S. degree in electrical engineering at the City College of New York in 1945, and his M.S. in electrical engineering from the Polytechnic Institute of Brooklyn in 1947. He also pursued graduate studies in electrical engineering and businss administration at the University of Pittsburgh and University of California at Los Angeles.

87. After receiving an offer of government employment and before assuming his position as computer scientist with the government, Crandon submitted financial information to Boeing. Taking into account a number of factors, Crandon calculated the financial cost of his separation from Boeing to be approximately $150,000.

88. Boeing based the amount of Crandon's severance payment on two alternate calculations. The first calculation took into account such factors as the income he might expect to lose by leaving Boeing and the forfeiture of Boeing contributions to certain employee benefit plans. The second calculation was based upon a formula that awarded a percentage of the employee's final Boeing salary multiplied by his years of Boeing employment. In determining the actual amount of Crandon's payment, Boeing chose a figure between the results reached using the alternate calculations referenced herein.

89. On March 5, 1982, before Crandon was appointed to any government position, Boeing made a severance payment to him of $40,000, less withholding tax.

90. At the time Crandon received the severance payment from Boeing, he had not secured, and was not guaranteed, his appointment, and the United States had

assumed no employment obligations to Crandon with respect to that appointment.

91. Crandon was not required to file a financial disclosure statement pursuant to the Ethics in Government Act.

92. Crandon terminated his employment with Boeing on March 5, 1982.

93. In September 1982, an agent of the FBI interviewed Crandon in Brussels as to the nature of the severance payment he had received.

94. Crandon cooperated with government investigators inquiring into the circumstances surrounding his receipt of a severance payment from Boeing in 1982.

95. In October 1983, Crandon executed an affidavit regarding his severance payment, which was submitted to the Department of Justice by July 1984.

96. Crandon's receipt of the severance payment has been known to responsible officials of the Defense Department and to responsible officers of the Justice Department since at least 1982.

97. On March 8, 1982, Crandon began his service as a computer scientist for the NATO ACCS.

98. Crandon's supervisors at NATO have been fully aware of his prior employment at Boeing.

99. In his government position, Crandon has no direct procurement role, does not award contracts, and does not make any source selection decisions.

100. Crandon was hired by the government with the understanding that he would remain for two years, with an option available to both sides to request a third year of service. Crandon's work has been of such caliber that after the two-year period, the government requested that he agree to remain for another three years. Recently, the

government requested that he remain until December 31, 1987, rather than March 1987.

101. Crandon's superiors in the Department of Defense were and are fully satisfied that Crandon capably, faithfully and honorably performs his public duties without bias and with independence and impartiality.

102. Prior to this case, the Department of Justice has never sued the recipient of any severance payment, on account of such payment, regardless of the amount of of the payment or method by which it was calculated.

103. No officer or employee of the Department of Defense (including the Department of the Navy) has concluded that, as a result of any defendant's receipt of a severance payment from Boeing, that defendant engaged in a "conflict of interest situation" or committed a "breach of the fiduciary duty of individual loyalty" owed to the United States during government employment.

II. *Facts That Plaintiff Will Not Contest*

104. Boeing has not received preferential treatment as a result of severance payments to its employees who entered government service.

105. Boeing never asked Messrs. Jones, Reynolds, Paisley, Kitson or Crandon to provide it with any preferential treatment or special advantages during their tenures with the government. These individuals have never provided Boeing with preferential treatment or special advantages during their tenures with the government.

106. When Boeing's severance payment practices were questioned in 1982 by the Department of Justice, Boeing voluntarily discontinued making severance payments to employees entering government service. Since that time, Boeing has not made any severance payments to any employee resigning to enter public service.

107. In 1971, the Defense Department asked Boeing whether Jones would be available for a position on the Strategic Arms Limitations Talks (SALT). The Defense Department rejected suggestions that it consider some of the employees recently laid off by Boeing rather than a current employee. The Defense Department insisted that Jones had a unique combination of technical expertise in weapons systems and experience in systems engineering and systems analysis which were vital to the SALT task.

108. The Defense Department asked Boeing to send Jones to Washington, D.C. at Boeing's expense from June 30, 1971, until the processing of Jones' appointment to government service was complete.

109. At the Defense Department's request, Jones began work for the Department on the SALT staff on June 30, 1971, while still an employee of Boeing.

110. In August 1971, the goverment completed processing Jones' appointment and he resigned his position with Boeing.

111. In late July or early August 1971, Boeing asked for and received from Jones an estimate of some of the financial losses Jones would incur by accepting the government position. Jones' salary with Boeing in 1971 was $24,600 per year, and the government position was to pay him $29,000.

112. On his last day of work at Boeing in 1971 Jones received a severance payment from Boeing of $5,000. The Deputy Under Secretary of Defense for Strategic Forces in 1971 was aware that Jones had received a severance payment from Boeing.

113. Jones was and is a recognized expert on nuclear forces and the strategic balance of power.

114. Jones was disinclined to leave Boeing and to return to the government, having rendered extensive

service to the government during his prior period of government employment as part of the SALT delegation. Dr. Wade assured Jones that Jones' expertise would be of great use to the government.

115. During those discussions, Jones told Principal Deputy Under Secretary Wade that he had received a severance payment from Boeing in 1971 and that he assumed that he would again receive a severance payment if he agreed to re-enter government service.

116. Jones also discussed his anticipated severance payment with Under Secretary DeLauer and explicitly was assured by the Under Secretary that receipt of a severance payment would present no problem.

117. Jones informed Col. Hollander that Jones' fiancee was a Boeing employee and that Jones was likely to receive a severance payment if he resigned from Boeing, and asked for guidance on those issues.

118. In late March 1981, Jones informed Dr. DeLauer and Dr. Wade that he was willing to accept appointment to the position of Deputy Under Secretary of Defense. Jones agreed to serve for four years.

119. Jones understood at that time that the government appointment was not assured, but rather was contingent upon successful completion of all formal appointment procedures and approvals in the Defense Department and the White House.

120. Before indicating willingness to accept government appointment, Jones knew from his own prior experience that Boeing had a practice of granting severance payments to mitigate the financial impact of leaving the Company's employ to accept positions of public service.

121. Jones did not provide Boeing with any preferential treatment or special advantages while he was in government service.

122. In 1985, after submitting a letter of resignation to the government, Jones received and rejected a job offer from Martin Marietta Co. Jones tentatively accepted an offer from General Dynamics Corp. in St. Louis and contracted to purchase a house there. On or about October 29, 1985, Jones decided instead to accept an offer of employment from Boeing back in Seattle.

123. On or about January 20, 1986, Jones began work at Boeing.

124. Paisley served in the United States Army Air Corps from 1943 until 1946 and was decorated 21 times while in the military. His decorations include the Distinguished Service Cross; the Silver Star, which he received three times; the Distinguished Flying Cross; the Air Medal with 16 clusters; and the French Croix de Guerre. Paisley, who shot down nine enemy planes, was himself shot down over Europe.

125. Paisley was honorably released from the Air Corps as a Captain at age 22 with partial hearing loss.

126. Before indicating willingness to accept government appointment, Paisley understood that Boeing had a practice of granting severance payments to mitigate the financiial impact of leaving the Company's employ to accept positions of public service.

127. Paisley reported the severance payment on his 1981 tax return and has paid the appropriate federal tax on the payment.

128. While in government service, Paisley has never provided Boeing with any preferential treatment or special advantage.

129. Reynolds flew B-17s in combat service in World War II and served in Korea. He is the recipient of 23 awards and decorations from the military, including the Purple Heart, the Distinguished Flying Cross and the Legion of Merit, which he received twice.

130. Reynolds served in the Army Air Corps and the United States Air Force for 26 years until he was medically retired in 1968 as a Lieutenant Colonel after sufering a heart attack.

131. While in the military, Reynolds was a flyer and worked in communications, strategic intelligence and in special reconnaissance operations. While Chief of the Classified Reconnaissance Division of the Far East Air Forces, Reynolds personally flew 17 special reconnaissance missions over foreign territories. Reynolds' final position in the Air Force was Director of Technical Intelligence for the European Command.

132. On or about September 1, 1968, Reynolds joined General Dynamics Corp. in Huntsville, Alabama, as a long-range planner for space systems.

133. In 1969, Reynolds joined H.R.B. Singer Company in State College, Pennsylvania, as Vice President of Corporate Development (Intelligence Systems). Reynolds worked for Singer for approximately seven years.

134. Reynolds joined Boeing on March 6, 1976 as a Senior Engineering Manager working on the "Black Space Program" (Satellite Systems Intelligence).

135. During the period October 1980 until March 1981, Reynolds served on President Reagan's Defense Transition Team. In May 1981, Reynolds was contacted by General Richard Stilwell, Deputy Under Secretary of Defense (Policy), who asked Reynolds to consider accepting appointment as Deputy Director of Space and Intelligence Policy in the Office of the Under Secretary for Defense.

136. Although Reynolds was within one year of eligibility for full retirement at Boeing, General Stilwell told Reynolds, "We need you. Your country needs you," and on or about June 1, 1981, Reynolds indicated willingness to accept appointment to the government position.

137. Before indicating willingness to accept government employment, Reynolds understood that Boeing had a practice of granting severance payments to mitigate the financial impact of leaving the Company's employ to accept positions of public service.

138. Reynolds did not provide Boeing with any preferential treatment or special advantages while he was in government service.

139. Kitson served in the United States Army from 1943 to 1946. He was involved in combat service in Europe. He was recalled to active duty in June 1951 and served in Korea until October 1952. Kitson completed his honorable service in the infantry as a First Lieutenant. Kitson had been awarded an appointment to West Point in 1944 but declined the appointment in order to remain as an enlisted man with his unit in combat duty overseas.

140. In 1950, Kitson joined General Electric Co. where he worked for nearly 18 years. He is a graduate of the General Electric Advanced Engineering Program. Kitson was an engineer, program manager, engineering manager and new business development manager in the aerospace arm of General Electric.

141. Kitson joined Boeing in 1968 as manager of military space programs. He subsequently served as requirements and new business manager on airborne warning and control systems ("AWACS"); new business development manager in strategic command, control, communications and intelligence ("C3I"); and as deputy program manager on the advance airborne command post and program manager on other highly classified space programs.

142. Before indicating a willingness to accept government employment, Kitson understood that Boeing had a practice of granting severance payments to mitigate the financial impact of leaving the Company's employ to accept positions of public service.

143. Kitson reported the severance payment on his 1982 tax return and has paid the appropriate amount of federal income tax on the payment.

144. In February 1983, while in Monterey, California on government business, Kitson was informed by his executive assistant, Commander Robert Cronin (U.S.N.), that FBI agents were in Kitson's Pentagon office searching through his files.

145. In his government position, Kitson did not make any procurement decisions, participate in source selection, or participate in meetings relating to Boeing procurements.

146. Kitson did not provide Boeing with any preferential treatment or special advantages while he was in government service.

147. Since Kitson resigned from government service, he has been self-employed as a consultant and has had no financial relationship with Boeing (other than receipt of retirement benefits).

148. Mr. Crandon has had approximately thirty-five years of aerospace industry experience in the areas of computer science, and communications, command, and control engineering. His employment history includes experience at Westinghouse Research Laboratories from 1948 to 1952, Hughes Aircraft Company from 1959 to 1971, and R.C.A. from 1971 and 1973.

149. Mr. Crandon joined Boeing in 1973 as a proposal manager and spent his last six years with Boeing as the NATO E-3A proposal manager.

150. Crandon was contacted by Assistant Deputy Under Secretary of Defense, Dr. Thomas Quinn, as one of three candidates invited to Washington, D.C., for an interview for the position of computer scientist.

151. During Crandon's preparation to leave Boeing, he was first told of the possibility of a severance payment.

152. While in government service, Crandon has never been asked to confer, nor has he conferred, any benefit, preferential treatment, or advantage upon the Boeing Company.

153. At this time, Crandon has no plans for his employment after December 31, 1987.

AGREED:

PLAINTIFF UNITED STATES OF AMERICA

By: _____

Vincent B. Terlep
Gordon A. Jones
Civil Division
U.S. Department of Justice
550 - 11th Street, N.W.
Room 1112A
Washington, D.C. 20001

By: _____

Joseph A. Fisher, III
Assistant U.S. Attorney
Office of the U.S.
Attorney for the Eastern
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DEFENDANT THE BOEING COMPANY

By: /s/ _____

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1110 Vermont Avenue, N.W.
Washington, D.C. 20005

By: /s/ _____

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1220 - 19th Street, N.W.
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DEFENDANTS MELVYN R. PAISLEY, THOMAS K. JONES, HERBERT A. REYNOLDS and HAROLD KITSON, JR.

By: /s/ _____

Philip A. Lacovara
Roger P. Fendrich
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Hughes Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
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By: /s/ _____

John A.C. Keith
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, Virginia 22030

DEFENDANT LAWRENCE CRANDON

By: /s/ _____

Gerald F. Treanor, Jr.
Amy S. Berman
Venable, Baetjer & Howard
4141 North Henderson Road
Plaza Suite 3
Arlington, Virginia 22203

November 20, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF T. A. WILSON

T. A. WILSON, having first been duly sworn on oath, does hereby depose and state:

1. I am employed by The Boeing Company, Seattle, Washington, as Chairman of the Board of Directors. I have been Chairman since 1972. From 1969 until April 1986, I was also Chief Executive Officer of the Company.

2. The Company has long had a practice of making severance payments to employees separating from the Company to accept positions with the federal government. That practice continued during my tenure as Chief Executive Officer, although no severance payments have been made since 1982.

3. The Company encourages and supports public service by its employees. For instance, Company employees serving in state and local government positions which do not require separation from the Company have been afforded paid leaves from the Company to perform their responsibilities. I am also personally aware of one instance where a Company executive was continued on partial salary to teach at a major university. The Company also assigns employees at full salary to support charitable programs such as the United Way. These financial arrangements are similar to severance payments in that they encourage public service by diminishing the personal economic disincentives associated with such service.

4. The Company is frequently asked by officials of the federal government to identify qualified Company employees for federal service and to encourage their service. Company employees are also recruited directly by federal officials. Because the Company has always understood that federal service requires an absolute and total severance of the employment relationship with the Company, the Company has in certain instances encouraged that federal service in part by severance payments which lessen the often substantial financial disincentives to terminating Company employment. Such severance payments also serve the purpose of totally severing the economic ties to the Company.

5. During my tenure as Chief Executive Officer, I personally reviewed and approved severance payments for Company employees separating to enter federal service. In my absence, such severance payments may have been reviewed and approved for the Company by the President of the Company.

6. I believe that I personally approved four of the five severance payments at issue in this matter. The severance payment to defendant Harold Kitson, Jr. was formally approved by the President of the Company. In each of these cases, a recommendation for a severance payment was orally presented to me. I considered only the recommended amount of the payment and was unaware of the specifics of any formula used to prepare the recommendations. My decision was based on my own judgment, considering the past Company service of the departing employee and my personal sense of the financial settlement appropriate to sever all Company ties absolutely and encourage acceptance of the government position.

7. In the case of defendant Melvin Paisley, I recall being presented with a computation sheet to support a recommended severance payment. I did not study the

computations because I considered the recommended severance payment to be excessive. I required that the recommendation be reviewed again and reduced before approval. I ultimately approved an amount lower than originally presented.

8. Boeing did not intend by the severance payments at issue in this matter to supplement the salaries of government officials or to influence their decisions while they were in federal service. There were no commitments or understandings sought or offered concerning future conduct of the departing employees. The severance payments in this matter were in no way contingent upon the length or quality of the departing employees' government service or the likelihood that the departing employees would ultimately return to the Company. Once the employee separated from the Company, the severance payment was his no matter what he did in the future, including going to work for a Boeing competitor.

/s/ T. A. Wilson
T. A. WILSON

SWORN TO AND SUBSCRIBED in my presence this 6th day of January, 1987, in Seattle, Washington.

/s/ Michael C. Holland
Notary Public in and for the State of Washington.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF LAWRENCE H. CRANDON

Lawrence H. Crandon, being duly sworn, deposes and says as follows:

1. I am a United States member of the NATO Air Command and Control System Team located in Brussels, Belgium. I am providing this affidavit to clarify the financial arrangements I made upon resignation from The Boeing Company.

2. I have had approximately thirty-five years of aerospace industry experience in the areas of computer science, and communications, command and control engineering, the last nine years of which were with The Boeing Company. In the fall of 1981, the Assistant Deputy Under Secretary of Defense (Communications, Command and Control) offered me a position as a computer scientist on the NATO ACCS team. After discussing this position with representatives of the Department of Defense and my colleagues at the Boeing Company, I accepted the offer and resigned from the Company effective March 5, 1982. I accepted the position, because it was an interesting opportunity which I felt would enhance my career, and because it afforded me an opportunity to live abroad for several years.

3. During my preparation to leave the Company, I was told of the possibility of a severance payment. I understood that before I could enter government service, I was

required to sever absolutely all financial ties with the Company, and that severance payment was an appropriate means of accomplishing that end. I informed the Company of my anticipated financial losses and discussed my accounting of them with representatives of the Industrial Relations department. My calculations of benefits accrued during my employment with The Boeing Company and to be lost as a result of government employment amounted to approximately $150,000. I was subsequently informed that the Company was prepared to make a severance payment of $40,000. I do not know how that figure was derived, but it was considerably less than my calculation of financial loss.

4. I believed at the time I left The Boeing Company, and I continue to believe, that the termination payment to me was in consideration of my financial losses incurred by forfeiting benefits accrued with The Boeing Company during my years of service there. I did not understand at the time, and currently do not believe, that the termination pay was intended to compensate for future government services or was to serve as a supplement to my government salary. At no time did any person at The Boeing Company ever state or imply that I had any obligation or commitment to the Company or that the Company had any expectations from me as a result of this termination payment.

5. My current assignment, by its terms, is for two years with a possibility of a one-year extension. Although I accepted the position expecting to seek reemployment in the aesrospace industry after my assignment, I have no understanding regarding reemployment with The Boeing Company. My conversations with Boeing representatives made clear that during my NATO assignment, I could have no explicit or tacit understanding regarding my future plans. I am well-trained and have considerable experience in aerospace engineering and communications by virtue of positions with seven aerospace com-

panies during my career. I believe that experience, as well as my government experience, will be valuable to prospective employers. In addition, I feel that enlisting expertise from private industry is of critical importance to the national defense. I am reassured when I discover that important roles regarding defense systems are being carried out individuals who, like me, believe that a strong defense effort is essential.

6. In my current position, I have no procurement or source selection role whatever. I did write the technical portion of an invitation for bids for a study to be performed by industry. I have been asked by my superiors to participate in the evaluation of the responses to that IFB. I have had virtually no business contacts with employees of The Boeing Company during the period of my government employment. I have never been asked for nor have I ever conferred any advantages to or taken any action that would benefit The Boeing Company.

7. It is my belief that termination payments are a common industry practice, and are the accepted means of severing an employee's financial ties with his prior industry employer. It was my belief at the time, and I continue to believe, that Boeing's payment and my acceptance of the termination pay were completely legal and proper.

/s/ Lawrence H. Crandon
LAWRENCE H. CRANDON

Subscribed and sworn to before me this 21 day of October, 1983.

/s/ [Illegible]
Notaire

My Commission Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF RICHARD D. DELAUER

I, Richard D. DeLauer, declare:

1. I submit this declaration on behalf Thomas K. Jones in connection with the action captioned above.

2. In March 1981, I became the Reagan Administration's designee to become Under Secretary of Defense for Research and Engineering. I was confirmed in that position in May 1981.

3. Shortly after I was designated, my Principal Deputy, Dr. James P. Wade, Jr., brought the name of Thomas K. Jones to my attention as a potential candidate for the position of Deputy Under Secretary for Strategic and Theater Nuclear Forces. Mr. Jones was and is a recognized expert on nuclear forces and on the strategic balance of power.

4. My Office contacted Mr. Jones in the spring of 1981 and urged him to interview for the Deputy Under Secretary position. I personally interviewed Mr. Jones during that period, and I decided to attempt to secure his appointment to that job.

5. Though Mr. Jones was disinclined to leave his position with Boeing, Dr. Wade and I prevailed upon him to consider the appointment. To the best of my recollection, Mr. Jones told me that he would be willing to serve for as long as four years.

6. During our discussions about his potential appointment, Mr. Jones mentioned to me that he had received a severance payment from Boeing when he entered government on a prior occasion and that he anticipated that he might receive another such payment if he left Boeing in 1981 to accept government service. I assured Mr. Jones that many top-level appointees coming into government from the private sector received severance payments upon their departure to enter government, and that I saw no problem if Mr. Jones was provided with a severance payment from Boeing.

7. After Mr. Jones entered into service as Deputy Under Secretary, he completed a financial disclosure form, on government Form SF-278. As I recall, Mr. Jones disclosed the amount of the severance payment from Boeing appropriately on the form that he filed in 1981. I approved his completed form and passed it on to those officials in the Office of the General Counsel of the Department of Defense who were responsible for reviewing standards of conduct. Those officials also approved the financial disclosure form that Mr. Jones filed in 1981.

8. As Deputy Under Secretary for Strategic and Theater Nuclear Forces, Mr. Jones was responsible for oversight and policy relating to offensive and defensive strategic systems, strategic airlift, and strategic arms control. He had no contract or procurement authority or responsibility. I was his direct supervisor and we met face-to-face on a regular basis.

9. Mr. Jones' performance in office was exemplary. He was extremely competent, eminently qualified and extraordinarily hard-working. I give him the highest marks for his performance of his public duties.

10. I can state categorically that I saw absolutely no evidence of favoritism or of any apparent or real conflict of interest on Mr. Jones' part during his term in office.

11. In my considered opinion, Thomas K. Jones is a man of the highest integrity and honesty. He served his country with great devotion and distinction, and I am pleased that I was involved in convincing him to accept a position with the United States.

12. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Richard D. DeLauer
RICHARD D. DELAUER

Dated: 7 Jan. 1987

Arlington, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF KENNETH N. HOLLANDER

I, Kenneth N. Hollander, declare:

1. I submit this declaration on behalf of Thomas K. Jones in connection with the action captioned above.

2. I graduated from the United States Military Academy in June 1963, and was commissioned as a Second Lieutenant in the United States Army. After tours in the United States and the Federal Republic of Germany, I served two combat tours in Southeast Asia. The first was as an advisor to the Vietnamese Rangers, the second as a military attache with a Cambodian infantry division. While still serving on active duty in the Army, I obtained an MBA degree from Tulane University in 1976. In January 1977, I was assigned to the Pentagon, where I served successively as military assistant to the Assistant Secretary of the Army for Research, Development and Acquisition and then in the Office of the Secretary of Defense as the Executive Assistant to three Under Secretaries of Defense for Research and Engineering.

3. Shortly after he was designated to become the Under Secretary of Defense for Research and Engineering in March 1981, Dr. Richard D. DeLauer selected me to be his Executive Assistant. At that time, I had been serving as the Executive Assistant to Dr. DeLauer's pred-

ecessor in that office, Dr. William Perry. I served as Executive Assistant to Dr. DeLauer until he left office in December 1984. Thereafter, I served as Executive Assistant to Donald A. Hicks, who succeeded Dr. DeLauer as Under Secretary. I retired from active duty in July 1985 while serving in the grade of Colonel after 22 years of active duty in the United States Army.

4. As Executive Assistant to Under Secretary DeLauer, a portion of my duties was to provide support and assistance in a variety of administrative matters. Among these duties, I helped insure that prospective political appointees were informed about the requirements and forms associated with federal employment. One of my specific tasks in that regard was to see to it that new appointees completed SF-278 financial disclosure report forms and to convey those forms to the Under Secretary for his review and signature. After the Under Secretary reviewed and signed the financial disclosure forms, I sent the forms to the Deputy Standards-of-Conduct counselor, who is responsible for completing a more detailed, official review. Finally, David Ream, a lawyer in the Office of the General Counsel of the Department of Defense, provides an additional substantive review of the financial disclosure reports prior to ultimate review and signature by the Designated Agency Ethics Officer.

6. I recall that during the spring of 1981 Thomas K. Jones was recruited for the position of Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces in Dr. DeLauer's office. I further recall that Mr. Jones' potential appointment was held up for several weeks during April and May 1981 pending completion of the political approvals necessary before his political appointment could be finalized.

7. During the pendency of Mr. Jones' potential appointment, I became aware that the Boeing Company

("Boeing") planned to or had given Mr. Jones a severance payment.

8. Mr. Jones asked me to confirm that it would be proper for him to accept a severance payment from Boeing. He also had a question about the propriety of his financee's continuing employment with Boeing. Because I regarded these as legal issues, I contacted the Office of the General Counsel of the Department of Defense in order to provide Mr. Jones with the appropriate responses. With respect to the question about the potential severance payment, I was told, and in turn told Mr. Jones, that any such payment, if awarded, would be reviewed as part of the normal procedures followed by the Department in processing his final appointment papers and employment forms, specifically the SF-278.

9. I later learned that Mr. Jones did, in fact, receive a severance payment from Boeing, and he included the amount of that payment in the financial disclosure report he filed on Form SF-278. I specifically remember calling to Under Secretary DeLauer's attention the fact that Mr. Jones had received a substantial severance payment from Boeing. The Under Secretary acknowledged that fact and told me that severance payments of that sort were not uncommon when executives left private employment to join the government. Dr. DeLauer then signed the SF-278 form as Mr. Jones' immediate supervisor, and I forwarded it to the Office of the Secretary of Defense Deputy Standards-of-Conduct counselor, in accordance with the procedures I described above in paragraph 4.

10. Based on my experience with the financial disclosure reports of appointees to positions within the Department of Defense, I know that a number of such appointees received termination settlements or severance payments from their private-sector employers prior to entering into government service.

11. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Kenneth N. Hollander
KENNETH N. HOLLANDER

Dated: 7 January 1987

Arlington, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF THOMAS K. JONES

I, Thomas K. Jones, declare:

1. I submit this declaration to supplement the affidavit I subscribed in 1983 (submitted as Plaintiff's Trial Exhibit No. 31) and in support of defendant's cross motion for summary judgment in this action.

2. I was first recruited to a government position in June 1971, when I agreed to accept the post of Senior Technical Advisor to the Honorable Paul Nitze. At that time, the Defense Department asked the Boeing Company ("Boeing") to send me to Washington, D.C. at Boeing's expense from June 30, 1971 until my appointment process was complete. At the Defense Department's request, I began work on the SALT staff on June 30, 1971, while still a Boeing employee. When the government completed processing my appointment in August 1971, I resigned my position with Boeing.

3. Before my appointment to the SALT position was completed, Boeing asked me for an estimate of some of the financial losses I would incur by accepting that government position. My salary at Boeing in 1971 was $24,600 per year, and my government position was to pay me $29,000.

4. On my last day at work at Boeing in 1971, I received a severance payment from the company of $5,000. The Deputy Under Secretary of Defense for

Strategic Forces in 1971, Ben Plymale, was aware that I received a severance payment from Boeing at that time.

5. In early 1981, I was contacted by Dr. Richard D. DeLauer, Under Secretary of Defense for Research and Engineering, and by Dr. James P. Wade, Jr., Principal Deputy Under Secretary of Defense, who urged me to consider the position of Deputy Under Secretary for Strategic and Theater Nuclear Forces. I was disinclined to leave my position with Boeing at that time, but Dr. Wade assured me that my expertise would be of great use to the government.

6. During discussions with Dr. Wade about the prospective potential appointment, I told him that I had received a severance payment from Boeing in 1971 and that I assumed that another severance payment might be proffered to me by the company if I departed to re-enter government service.

7. I also discussed the fact that I anticipated a severance payment from Boeing with Under Secretary DeLauer, and he expressly assured me that my acceptance of a severance payment would not present a problem.

8. In those discussions, Dr. DeLauer told me that he had received a severance payment from his former employer prior to entering government service and that he assumed that most senior corporate employees entering government service received severance payments upon their departure from the private sector.

9. During the same period, I also spoke with Dr. DeLauer's Executive Assistant, Col. Kenneth Hollander. Col. Hollander reviewed various federal employment requirements with me, including the need to sever all of my ties to Boeing.

10. I informed Col. Hollander that my fiancee was a Boeing employee and also that I was likely to receive a severance payment if I resigned from Boeing. In my

presence, Col. Hollandar telephoned the Office of the General Counsel at the Defense Department and reviewed the aforementioned topics in that telephone conversation. On the basis of that consultation with counsel for the Defense Department, Col. Hollander told me that my fiancee could continue to work for Boeing, but it might "look bad" if she did so. With respect to the potential severance payment, however, that was not considered problematic.

11. When I informed Dr. DeLauer and Dr. Wade in March 1981 that I was willing to accept an appointment if one were offered, I also told them that I could agree to serve for approximately four years.

12. At the time I received a severance payment from Boeing in 1981, I believed that Boeing's practice of paying severance pay to employees resigning to accept positions with the Department of Defense was only one aspect of a broader practice at Boeing which was not limited in its application to employees recruited for certain key positions with the federal government but, instead, was applied to Boeing employees being recruited for various sorts of public service. Based upon discussions with Boeing personnel, I also believed that Boeing had been advised by the Department of Defense that Boeing severance payment practices were legal, appropriate, and permitted by the federal government.

13. At the time I received the severance payment from Boeing in 1981, I did not know Boeing standards of eligibility for severance payments, nor did I know how Boeing calculated them. I knew only that Boeing had decided to make a severance payment to me that was over $43,000 lower than the amount that I had calculated would be the minimum financial impact upon me of leaving Boeing's employ.

14. No Boeing official ever suggested to me, and I never believed, that the severance payment was intended

to affect my performance in public office or that it was intended to represent any compensation for my future services to the government. Rather, I was told, believed, and still believe that the purpose of the severance payment was to sever all of my financial connections with Boeing so as to avoid any possible conflict of interest.

15. Moreover, I viewed the severance payment as a partial compensation for the loss of benefits which I had earned as a result of 25 years of prior service with the company.

16. Since I had been granted a severance payment by Boeing in 1971, I knew for a fact, based on my own prior experience, that Boeing never asked for—and never received—any special consideration or favors in exchange for a severance payment.

17. I included the amount of the Boeing severance payment on Schedule A of the financial disclosure form (SF-278) that I filed with the government in June 1981. Pursuant to express advice I requested and received from the Office of General Counsel of the Department of Defense, I reported the severance payment as income received from Boeing during 1981. I fully complied with the instructions rendered to me by the Office of the General Counsel.

18. I reported the severance payment as income on my 1981 federal income tax return and paid the appropriate federal income tax on that amount.

19. After I submitted my letter of resignation to the government in 1985, I was offered a job by the Martin Marietta Company, but I turned down that offer. I then tentatively accepted a job offer from General Dynamics Corp. and signed a contract to purchase a house in St. Louis in early November 1985. Thereafter, I received an offer of employment from Boeing and accepted that offer on or about Ocotber 29, 1985. I have continued to work for Boeing from January 1986 until the present time.

20. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Thomas K. Jones
THOMAS K. JONES

Dated: Jan. 6, 1987

Seattle, Washington

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF ADMIRAL ROBERT E. KIRKSEY

I, Robert E. Kirksey, declare:

1. I submit this declaration on behalf of Harold Kitson, Jr. in connection with the action captioned above. As explained in more detail below, I worked closely with Mr. Kitson when he served as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence ("C3I").

2. I served on active duty as a naval officer for 35 years. I entered the United States Navy in 1948 while attending Michigan State University. In 1951, during the Korean conflict, I went on active duty and was commissioned as a naval aviator. I was a fighter pilot during the Korean conflict.

3. During the Vietnam war, I was the commanding officer of an aviation squadron. I flew 240 missions and received a Silver Star, four Distinguished Flying Crosses and 21 Air Medals.

4. After serving as commanding officer of the U.S.S. Cleveland in 1972 and of the aircraft carrier Kitty Hawk from 1973 to 1975, I was promoted to Rear Admiral in 1976. From 1978 until 1981, I commanded a carrier group, a task force, and a battle force in the Indian Ocean.

5. In 1984 I was promoted to Vice Admiral and took assignment as the Director of Command and Control,

Space in the Office of the Chief of Naval Operations. The area of Command and Control, in the parlance of the uniformed services, is the functional equivalent (and complement) of C3I within the Department of Defense.

6. I met Harold Kitson, Jr. in July 1984, while he was serving as Deputy Assistant Secretary of the Navy for C3I. As Director of Command and Control, I served as Mr. Kitson's functional counterpart on the uniformed services side.

7. Mr. Kitson and I worked closely together in formulating positions and policy in the areas of command and control. We had almost daily contact. While I had no formal supervisory responsibility over Mr. Kitson, I saw his work close at hand and had occasion to form regular judgments concerning his capabilities and the quality of his achievements.

8. In my considered opinion, Mr. Kitson handled his job with great technical expertise, a keen appreciation for Navy requirements, and complete devotion to his duties. I would place him among the top rank of all civilian appointees with whom I have had the opportunity to work.

9. I knew that Mr. Kitson had come into government service from prior employment with the Boeing Company. Mr. Kitson had disqualified himself from any matters that might affect Boeing. In my personal observation, Harold Kitson religiously adhered to that disqualification and carefully avoided any involvement in decisions that might have an impact upon Boeing. I saw absolutely no evidence or appearance of favoritism, bias or conflict of interest on Mr. Kitson's part during his government service.

10. On several occasions, I discussed with Mr. Kitson the fact that, when he took on the position of Deputy Assistant Secretary, he and his family had decided that

he would devote about two years to government service. When he voluntarily resigned from his position in June 1985, Mr. Kitson had served the government for almost three years. He decided that he had fulfilled his commitments and that it was time to move on to other endeavors.

11. In my judgment, Mr. Kitson performed his public duties capably, faithfully, and with great dedication. I believe him to be a man of the highest personal integrity and honor.

12. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Robert E. Kirksey
ROBERT E. KIRKSEY

Dated: 6 Jan. 1987

McLean, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF HAROLD KITSON, JR.

I, Harold Kitson, Jr., declare:

1. I submit this declaration to supplement the affidavit I subscribed on January 6, 1984 (submitted as Plaintiff's Trial Exhibit No. 92) and in support of Defendants' Cross Motion for Summary Judgment.

2. I enlisted in the United States Army in 1943, saw combat service in Europe, and received an honorable discharge in 1946. Though I had been granted an appointment to West Point in 1944, I declined it so that I could remain with my unit for combat duty in Europe. In June 1951, I was recalled to active duty and had combat service in Korea until October 1952. When I was honorably discharged, I was a First Lieutenant in the infantry.

3. In 1950, I joined the General Electric Co. I graduated from the General Electric Advanced Engineering Program. During my 17 years at General Electric, I served as an engineer, program manager, engineering manager, and new business development manager primarily in the Missile and Space Division.

4. In 1968, I joined Boeing as a manager of Military Space Programs. Subsequently, I served as requirements and new business manager on the Airborne Warning and Control Systems ("AWACS"); as new business development manager in Strategic Command, Control, Communications and Intelligence ("C3I"); as deputy program

manager on the Advanced Airborne Command Post; and as program manager on other highly classified space programs.

5. In April 1982, I was contacted by Assistant Secretary of the Navy Melvyn R. Paisley who asked whether I was interested in considering a potential appointment as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence ("C3I"). In order to pursue this opportunity to again serve my country and contribute to its defense, I retired from Boeing on August 1, 1982, taking diminished early retirement benefits because the retirement was taking place prior to the age at which full benefits are available.

6. In July 1982, before my appointment as Deputy Assistant Secretary of the Navy was completed, Boeing made me a severance payment of $50,000.

7. I viewed this severance payment as partial compensation for the loss of benefits which I had earned as a result of my 14 years of prior service with Boeing and loss of additional benefits that I would have earned if I had remained with the company.

8. No Boeing official ever suggested to me, and I never understood or believed, that the severance payment was intended to affect the performance of my public responsibilities.

9. I believed, and I still believe, that the purpose of the severance payment was to sever all financial ties that I had with Boeing.

10. No one at Boeing ever suggested that the severance payment was intended to supplement my government salary or to compensate me for services to the government, and I never viewed the payment in any such way.

11. Within days of my entry into government service in September 1982, I submitted a letter to the Assistant Secretary by which I disqualified myself from working

on matters related to Boeing. That disqualification remained in effect throughout the period of my government employment, and I adhered to it.

12. While I was in government service, I never was involved in any procurements dealing with Boeing nor ever provided Boeing with any preferential treatment or special advantages.

13. I included the full amount of the Boeing severance payment on the financial disclosure forms that I filed upon entering government service.

14. I reported the severance payment as income on my 1982 tax return and paid the appropriate amount of federal income taxes on that payment.

15. While in Monterey, California on government business on February 1983, I was informed by my Executive Assistant that FBI agents were conducting an investigation of my files. I later learned that the investigation concerned the severance payment that Boeing had made to me in 1982. I cooperated fully with that investigation, which the government later closed without taking any legal action.

16. Since I voluntarily resigned from government service in June 1985, I have been self-employed as a consultant. Other than my receipt of regular retirement benefits, I have had no relationship of any kind with Boeing.

17. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Harold Kitson, Jr.
HAROLD KITSON, JR.

Dated: 1-8-87

Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF SECRETARY OF THE NAVY JOHN F. LEHMAN

I, John F. Lehman, declare:

1. I am the Secretary of the Navy and have served in this position pursuant to Presidential appointment and Senate confirmation since the beginning of the present Administration in 1981.

2. I am submitting this Declaration at the request of counsel for Assistant Secretary of the Navy Melvyn R. Paisley and former Deputy Assistant Secretary of the Navy Harold Kitson, Jr. to support their opposition to the Justice Department's Motion for Summary Judgment in this case and their own Cross-Motion for Summary Judgment.

3. I personally recruited Mr. Paisley to become Assistant Secretary of the Navy in 1981. I knew at the time that he was employed by The Boeing Company. During my discussions with Mr. Paisley about the possibility of his leaving Boeing to work with me in the Department of the Navy, Mr. Paisley candidly informed me that he would incur substantial financial losses if he chose to leave Boeing at that stage of his career. My understanding was that lost stock options and the obligation to exercise then-existing options at a depressed market price would make up a major part of a loss that Mr. Paisley told me might approach $1 million.

4. During our discussions, Mr. Paisley informed me that he understood that Boeing would probably make some form of severance payment to him if he resigned

from Boeing. I discussed with other personnel of the Department of the Navy the substantial financial impact that Mr. Paisley would incur if he left Boeing. At the time of my discussions with Mr. Paisley before his appointment, I did not see any way in which his receiving a severance payment from Boeing would in any way undermine his ability to perform capable, objective, and honorable service as an Assistant Secretary of the Navy, and I do not now see how receiving a severance payment could have interfered with his performance of his official responsibilities.

5. Among the reasons why I saw no problem when Mr. Paisley informed me that he might receive a severance payment from Boeing is that severace payments are a common occurrence when highly respected, highly expert, senior officers and employees of private-sector companies leave those positions in order to perform public service. Many of the other persons whom I have recruited for government service also have obtained severance payments when they resigned from private employment.

6. In my experience, the receipt of a severance payment from his former employer does not in any way interfer with the ability of a public official to render fair-minded, loyal, and dedicated public service. In fact, the availability of a severance payment may tip the scales in convincing a private-sector employee to interrupt his career and to consider rendering public service.

7. From discussions with Mr. Paisley around the time that he resigned from Boeing, I knew that the severance payment that Boeing offered him was only a fraction of the amount that he calculated he would lose if he left Boeing. I was pleased that, nevertheless, he was willing to accept appointment as Assistant Secretary of the Navy.

8. Mr. Paisley has served as Assistant Secretary of the Navy for Research and Engineering for more than five years. I have worked with him in this capacity on a direct and personal basis virtually every day. From my observations, Assistant Secretary Paisley has been rendering outstanding public service in the highest traditions of our Government. There has never been any hint of favoritism toward Boeing, and in fact he has bent over backwards to avoid situations in which his former employment by Boeing might raise even questions of appearances. From what I have observed, Asisstant Secretary Paisley's former employment by Boeing and his receipt of a severance payment from Boeing have not in any way compromised or jeopardized his loyal pursuit of the interests of the United States Government and the people of the United States.

9. I also know former Deputy Assistant Secretary of the Navy Harold Kitson, Jr. I approved his appointment to that position. I was aware at that time and throughout his service to the Department of the Navy that he had been recruited to leave Boeing in order to accept a government appointment.

10. I know that Mr. Kitson, like Assistant Secretary Paisley, received a payment from Boeing in order to sever his connections with the company when he left private employment. I did not and do not see that his receipt of a severance payment in any way endangered his ability or his willingness to perform the important public service for which he was recruited.

11. Although I did not work closely with Mr. Kitson during his tenure here, he enjoyed an excellent reputation for capable and dedicated service. Even after the Department of Justice began its inquiry into the severance payments received by several former Boeing employees, I saw no reason to question Mr. Kitson's judgment, integrity, objectivity or loyalty.

12. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ John F. Lehman
JOHN F. LEHMAN

Dated: January 7, 1987

The Pentagon
Arlington, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF MELVYN R. PAISLEY

I, Melvyn R. Paisley, declare:

1. I submit this declaration to supplement the affidavit I subscribed in 1984 (submitted as Plaintiff's Trial Exhibit No. 36) and in support of Defendants' Cross Motion for Summary Judgment in this action.

2. I currently serve the United States as Assistant Secretary of the Navy for Research, Engineering and Systems.

3. I joined the United States Army Air Corps in 1943 and served as a pilot in European combat during World War II. My decorations include the Distinguished Service Cross, two Silver Stars, the Distingished Flying Cross, the Air Medal with sixteen clusters, and the French Croix de Guerre.

4. I was honorably discharged (with partial hearing loss) from the Air Corps as a Captain in 1946.

5. I joined the Boeing Company ("Boeing") as an engineer in January 1954. After spending almost 28 years with the Company, I was contacted in mid-1981 by the Office of the Secretary of the Navy to see if I would be willing to have my name forwarded for potential nomination as Assistant Secretary of the Navy.

6. Prior to my appointment, I submitted information to Boeing that indicated that the financial impact of

my separating from the company would be approximately $825,000. Before I left Boeing's employ, I was told that the Company would make a severance payment to me of $183,000. I was not told Boeing's basis for determining the amount of this payment. I knew only that Boeing's payment was considerably less (on the order of $640,000 less) than the estimated financial impact of my leaving Boeing's employ.

7. When I took early retirement from Boeing on or about October 1, 1981, I had no understanding regarding possible re-employment with Boeing at some future time. Boeing did not commit to re-employ me, ask me to return after my government service was completed, or indicate that any return on my part was expected. As for me, I made no committment to return to Boeing at any future time.

8. Because I left Boeing prior to the ordinary retirement age, I was eligible only for diminished "early retirement" benefits from the Company.

9. The severance payment that I received from Boeing was fixed, final and irrevocable. It was not contingent upon White House approval of my nomination, upon Senate confirmation of the appointment or upon my remaining in government service for any period of time. Nor was the payment affected by any change in my government salary, change in government position, continuation in government service for any particular period of time, or possible resignation at any time from the government's employ.

10. No agent of Boeing ever suggested to me, and I never believed, that the severance payment was intended to have any effect upon the performance of my public duties.

11. No one at Boeing ever told me, and I did not understand or believe, that the severance payment was a

supplement to my government salary or represented any compensation for my services to the government.

12. When I received the severance payment from Boeing, I believed that Boeing had been advised by the Department of Defense that Boeing's severance payment practices were legal, appropriate, and permitted by the federal government.

13. I reported the severance payment received from Boeing as income on my 1981 federal tax return, and I paid the appropriate amount of federal taxes on that payment.

14. While in government service, I have never provided Boeing with any preferential treatment or special advantages.

15. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Melvyn R. Paisley
MELVIN R. PAISLEY

Dated: Jan 6/1987

The Pentagon

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF HERBERT A. REYNOLDS

I, Herbert A. Reynolds, declare:

1. I submit this declaration to supplement the affidavit I subscribed on October 28, 1983 (submitted as Plaintiff's Trial Exhibit No. 83) and in support of Defendants' Cross Motion for Summary Judgment.

2. After graduating from the Army Flying School, I flew B-17s in combat during World War II, and I also served in Korea. I have received 23 awards and decorations in connection with my military service, including the Purple Heart, the Distinguished Flying Cross and the Legion of Merit, which I received on two occasions.

3. I served in the Army Air Corps and in the United States Air Force for 26 years. In 19[illegible], I was medically retired from the military as a Lieutenant Colonel after suffering a heart attack.

4. While in the Air Force, I was a pilot and also worked in communications, strategic intelligence, and in special reconnaissance operations. I flew 17 special reconnaissance missions on the periphery or over foreign territories while I served as Chief of the Classified Reconnaissance Division of the Far East Air Forces. Prior to my retirement from the Air Force, I was Director of Technical Intelligence for the European Command.

5. On September 1, 1968 I joined General Dynamics as a long-range planner for space systems. Thereafter,

in 1969, I accepted a position as Vice President of Corporate Development (Intelligence Systems) with the H.R.B. Singer Company in State College, Pennsylvania. I worked for Singer for approximately 7 years.

6. I was recruited by and joined the Boeing Company ("Boeing") in March 1976. I joined that company as a Senior Engineering Manager with duties associated with space systems.

7. In May 1981, General Richard Stilwell, Deputy Under Secretary of Defense for Policy, contacted me about a potential appointment as Deputy Director of Space and Intelligence Policy in the Office of the Under Secretary of Defense. Since I was within one year of meeting the eligibility requirements for retirement benefits at Boeing, I was disinclined to pursue the potential appointment. With respect to the position, however, General Stilwell told me, "we need you; your country needs you." On or about June 1, 1981, I indicated to General Stilwell my willingness to begin the appointment process.

8. Subsequent to the aforementioned conversation with General Stilwell, I learned that Boeing had a practice of sometimes granting severance payments to help mitigate the financial impact of leaving the company's employ.

9. I believed that Boeing offered severance payments to its employees pursuant to a longstanding policy which the company had disclosed to, and which had been accepted by, the government.

10. An employee in the Boeing personnel office told me that I would be eligible "to be considered" for a severance payment. I did not know the standards of eligibility for such payments or any limitations on such eligibility.

11. I did not know the method or formula, if any, by which Boeing calculated severance payments.

12. Several weeks before I departed Boeing, at the company's request, I submitted some financial information to the company showing that the monetary impact on me of separating from the company at that time would amount to approximately $194,518. This figure included forfeiture of my military pension rights and lost investment plan rights. Before I left Boeing's employ, I was told that Boeing would make me a severance payment of $80,000. I was not told the basis for the amount of this payment, but I realized, of course, that it was over $114,000 lower than the calculations that I had submitted to the company. I was never told, and have never been told, by what method Boeing calculated the amount of my severance payment.

13. When I resigned from Boeing in July 1981, I had no understanding with the company regarding possible re-employment. Boeing did not commit to re-employ me or ask me to return after the completion of my government service, or indicate in any way that my return was expected. For my part, I made no commitment to return to Boeing.

14. At the time that I received the severance payment from Boeing, I felt considerable anxiety about the fact that I had absolutely no guarantee that my appointment as Deputy Director of Space and Intelligence Policy would be approved. Indeed, because of my heart condition, I felt extremely vulnerable when I resigned from Boeing.

15. The severance payment made to me by Boeing was fixed, final and irrevocable. It was not contingent upon my securing the potential appointment with the government, nor upon my remaining in government for any period of time, nor upon any changes in government salary, position, or potential length of government service.

16. No one at Boeing ever suggested to me, and I never understood or believed, that the severance payment

was intended to affect the performance of my public duties or responsibilities.

17. I believed and still believe that the purpose of the severance payment was to sever all financial ties between Boeing and me.

18. I saw the severance payment as a partial compensation for the loss of benefits that I had earned as a result of my employment relationship with Boeing and for the loss of additional benefits that would have accrued if I had elected to remain with the company.

19. No one at Boeing ever told me that the severance payment was intended to supplement my government salary or to serve as compensation for my services to the government, and I did not view the severance payment in any such way.

20. While I was in government service, I did not provide Boeing with any preferential treatment or special advantages.

21. Though I had intended to resign my government position in 1984, I continued to serve as a consultant to the Defense Department at General Stilwell's request until the fall of 1985. During that period of continued government service, I suffered three heart attacks, and I resigned in September 1985 with a total medical disability.

22. In October 1986, I underwent multiple bypass surgery for my heart condition. I am currently recuperating from that operation under a doctor's care.

23. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Herbert A. Reynolds
HERBERT A. REYNOLDS

Dated: 6 Jan. 87

Seattle, Washington

IN THE UNITED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DECLARATION OF GENERAL RICHARD G. STILWELL

I, Richard G. Stilwell, declare that:

1. I submit this declaration on behalf of Herbert A. Reynolds in connection with the action captioned above.

2. In the period from March 1981 until March 1985, I served as Deputy Undersecretary of Defense (Policy) and, in that position, I was the direct supervisor of Mr. Reynolds, who served as Deputy Director of Space and Intelligence Policy within the Office of the Deputy Undersecretary of Defense Policy.

3. I graduated from the United States Military Academy in 1938. Thereafter, I served for almost 39 years as an officer in the United States Army, advancing to the rank of full General in 1973.

4. I am a decorated veteran of three wars. I served as Deputy Chief of Staff of the United States Army from 1969 until 1972 and, from 1973 until mid-October 1976, I was concurrently Commander-in-chief of the United Nations Command, Commander of United States Forces in Korea, and Commanding General, Eighth United States Army.

5. I retired from the United States Army in 1976. As previously noted, I served as Deputy Undersecretary of Defense (Policy) beginning in March 1981. I left that position voluntarily four years later. Then, at the request

of the Secretary of Defense, I chaired the Department of Defense Security Review Commission from June 1985 until December 1985. For most of 1986, I performed a special mission for the Director of Central Intelligence. I am currently a consultant to the Secretary of Defense.

6. In or about May 1981, after I had assumed the position of Deputy Undersecretary of Defense (Policy), I became interested in recruiting a potential appointee with expertise in space policy matters. Someone at the Pentagon mentioned Herbert A. Reynolds as a desirable candidate with the requisite credentials for the position of Deputy Director of Space and Intelligence Policy.

7. I contacted Mr. Reynolds, who was then an employee of the Boeing Company, to determine his suitability for and interest in the open position. After a personal interview, I recommended Mr. Reynolds for the position of Deputy Director. The Deputy Director position was an unscheduled (or so-called "Schedule C") appointment, which required approval at the highest levels, including approval by the Secretary of Defense and the White House personnel office.

8. I explained to Mr. Reynolds that the proposed appointment required a full background investigation, adjudication of investigation results and White House clearance before the appointment could be officially tendered and completed. At my request, Mr. Reynolds began service as a Defense Department consultant in late July 1981, and served in that consultancy position until his appointment was finalized in October 1981.

9. As Deputy Undersecretary of Defense for Policy, I was Mr. Reynolds' direct supervisor, and I was the individual who was charged with the responsibility for evaluating his performance in office. At the time of my recruitment of Mr. Reynolds I knew that he was an employee of the Boeing Company. I was, in effect, attempting to "lure" a talented person from the private sector

into government. That practice is normal in technical fields such as the field of space policy.

10. Mr. Reynolds' responsibility encompassed the entire area of national space policy. Since he was my principal staff officer for the function—formulating, coordinating, finalizing space policies—we were in contact almost every working day.

11. My office's functions were limited to policy matters including space policy. Accordingly, Mr. Reynolds had no contract or procurement authority while in DOD employ.

12. In my view, Mr. Reynolds' loyalty and devotion to duty were outstanding. He proved to be substantively sound and highly competent in his field; and he was an exceptionally hard worker and a good writer. He interfaced well with other personnel. I am convinced it was a wise decision on my part, and on the part of the government, to hire him as Deputy Director.

13. I can state categorically that I never saw any evidence of favoritism, bias, or conflict of interest on his part while Mr. Reynolds served in public office.

14. Upon his resignation from office in May 1984 due to reasons of health, Mr. Reynolds received, in recognition of his outstanding service and upon my recommendation, the "Secretary of Defense Meritorious Civilian Service Award."

15. When I hired him in 1981, I knew that Mr. Reynolds had had a history of heart-ailments. I believe it is further testimony to his professionalism and devotion to country that he persevered, despite this illness, with the role that he had accepted on behalf of the United States.

16. Without qualification, I was and am fully satisfied that Mr. Reynolds capably, faithfully and honorably performed his public duties without bias and with independence and impartiality.

17. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Richard G. Stilwell
RICHARD G. STILWELL

Dated: January 5, 1987

Arlington, Virginia

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE SG
TUESDAY, JULY 21, 1982 202-633-2018

Rex E. Lee, Solicitor General, today made the following statement:

"Mr. D. Lowell Jensen, Assistant Attorney General in charge of the Criminal Division, has submitted to me a report of an FBI inquiry concerning then Attorney General-designate William French Smith's receipt of a $50,000 severance payment on January 12, 1981, from the Earle M. Jorgensen Company, on whose Board of Directors Mr. Smith had served for some six years.

"That report concludes that the severance payment was intended as compensation for Mr. Smith's past services to the Corporation and not to supplement Mr. Smith's government salary. Accordingly, the report further concludes that the receipt of his payment and events surrounding it did not trigger the Special Prosecutor provisions of the Ethics in Government Act, 28 USC 591, *et seq.* At my request, the report was also reviewed by the Department of Justice's Office of Professional Responsibility. The Office of Professional Responsibility agrees with the findings and conclusions of the report, and further concludes that the events surrounding the receipt by Mr. Smith of the severance payment do not raise ethical concerns warranting any further action.

"I have also received from Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, a report of that office's review of the Attorney General's participation in an investment program. That report, which I am releasing, reaches the conclusions which follow. (1) There was no criminal misconduct. (2) The investments were in technical violation of a Department of Justice regulation, 28 C.F.R. Section 45.735-11, which prohibits a departmental employee from investing "in enterprises

. . . which are reasonably likely to create any conflict in the proper discharge of his official duties." (3) The Attorney General took voluntary steps sufficient to cure the matter by electing to forego all tax benefits flowing from the investments in excess of his actual capital outlay and by recusing himself from any decisions involving the tax treatment of energy drilling investments.

"While it is not clear to me that the regulation at issue applies to the facts of this case, there is no need to resolve that narrow legal issue, because in any event I agree with the Office of Professional Responsibility that no further action need be taken, and the case should be closed.

"Accordingly, I have accepted the reports of the Criminal Division and the Office of Professional Responsibility, and both the matters concerning the receipt of the severance payment from the Earle M. Jorgensen Company and also the participation in the Yale-Quay Investment program are closed.

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DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
WEDNESDAY, JULY 21, 1982

OPA
202-633-2018

Thomas P. DeCair, Director of Public Affairs, issued the following statement today:

As the Solicitor General announced today, separate investigations into certain transactions involving the Attorney General have now been concluded by the Public Integrity Section of the Criminal Division and the Office of Profesisonal Responsibility. The Attorney General is pleased with their unanimous conclusion that these matters have now been closed.

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REPORT OF THE DEPARTMENT OF JUSTICE SUMMARIZING THE CRIMINAL DIVISION'S FINDINGS AND CONCLUSIONS REGARDING THE JORGENSON SEVERANCE PAYMENT TO WLLIAM FRENCH SMITH

On May 7, 1982, Attorney General William French Smith filed a Financial Disclosure Report with the Office of Government Ethics reflecting the receipt of a $50,000 Director's fee from the Earle M. Jorgensen Company ("the Company"). On May 14, 1982, in a letter to the Office of Government Ethics amplifying certain matters in the Attorney General's Disclosure Report, the Associate Attorney General explained that the $50,000 Director's fee on the report was a severance payment to Mr. Smith from the Company "for his past services as a member of the Board of Directors." Shortly thereafter questions were raised in the press and elsewhere as to whether the severance payment violated 18 U.S.C. § 209, which proscribes the supplementation of a government-salary by non-government sources. Because of these questions, the Solicitor General directed the Criminal Division and the Federal Bureau of Investigation to undertake an investigation into the circumstances of the payment. Because the Attorney General, Deputy Attorney General and Associate Attorney General have recused themselves from this matter, the Solicitor General has served as Acting Attorney General for purposes of this case. That investigation is now complete. This Report summarizes the investigative findings and analyses the applicability of 18 U.S.C. § 209 and the Special Prosecutor provisions of the Ethics in Government Act. 28 U.S.C. § 591, *et seq.*

Summary of Investigation

In order to ascertain the purpose of the severance payment, the FBI conducted interviews with each of the 14 members of the Company's Board of Directors who

were present when the severance payment was voted. The attorneys who provided legal advice to the Company regarding the payment also were interviewed. Finally, Mr. Smith himself was interviewed. The following is a summary of the investigative findings:

William French Smith was named to the Board of Directors of the Earle M. Jorgensen Company in 1975. At the time he was a partner in the law firm of Gibson, Dunn & Crutcher, which did not represent the Company as outside counsel. The Company is a highly successful steel producer with some 2,000 employees and plants in over a dozen cities throughout the United States. Earle M. Jorgensen is the founder of the Company and presently serves as Chairman of the Board and Chief Executive Officer. Between March 1975 and January 1981, Mr. Smith attended 25 of 26 Board of Directors meetings. In March 1978, Mr. Smith also was appointed to serve on the Company's Audit Committee and he attended five of the six Audit Committee meetings held prior to his resignation in January 1981. It was the general belief of the other Directors that Mr. Smith made invaluable contributions to the Company through his service on the Board and the Audit Committee.

On January 2, 1981, after the President announced an intention to name him Attorney General, Mr. Smith sent a letter to Earl M. Jorgensen resigning his position on the Board of Directors. On January 6, 1981, the Company's five-member Executive Committeee unanimously voted to recommend to the Board of Directors that a $50,000 severance payment be made to Mr. Smith in recognition of his past service to the Company. Advice was obtained from the law firm of O'Melveny & Myers that the payment would be proper as long as it was intended to compensate Mr. Smith for past services.

At the Board of Directors meeting on January 12, 1981, the Executive Committee's recommendation of a

$50,000 severance payment to Mr. Smith was unanimously approved by the Board. The resolution granting the $50,000 payment read as follows:

> RESOLVED, that Mr. William French Smith be paid by the company a sum in the amount of $50,000 severance pay for his loyal and dedicated past service to the company as a member of its Board of Directors and Audit Committee.

Mr. Smith stated that he knew nothing of the payment until he actually received it and that he accepted the payment as a fee for past services. Mr. Smith was informed on January 12 that the legality of the payment had been approved by the Company's outside counsel.

The Company had no set policy and few precedents for determining severance payments for outside Directors. In the past, whenever an outside Director resigned from the Board the question of a severance payment was considered on the individual facts of each case. The few outside Directors who had resigned from the Company in the past had received severance payments ranging from very expensive gold watches to the continuation of regular Director's fees for life, which resulted in a total payment of approximately $25,000. Mr. Smith's situation was unique, however, when compared to the other outside Directors who had resigned from the Board. First, it was the general belief of the Board that the nature of Mr. Smith's contributions to the Board and the Company were highly significant and valuable. Typical was the statment of Earle M. Jorgensen:

> Attorney General Smith's value in dollars was well beyond the amount of the remuneration he received for his service on the Board of Directors and the Audit Committee. [I]f the company had paid for the fair value of the benefit of his legal advice alone, the bill would have far exceeded the $50,000 severance pay given him. Attorney General Smith was a "bargain" for the Jorgensen Company for what he contributed in the way of services as a member of the Board and the Audit Committee.

Second, Mr. Smith was the first outside Director of the Company who did not otherwise have a business or financial relationship with the Company. One outside Director, whose law firm was outside counsel to the Company, explained the relevance of this factor as follows:

> [T]he intent of the Board of Directors was to recognize Mr. Smith's contribution to the company over and above that which he had been paid in fees as a member of the Board of Directors and the Audit Committee. . . . [U]nlike members of the Board who were also officers of the company or had a business relationship with the company . . . Smith received nothing from the company other than these fees. It thus appeared appropriate to give him a severance payment of this type and $50,000 was considered reasonable on the basis of past services rendered by Smith.

Thirteen of the fourteen Directors stated unequivocally that the payment was intended to compensate Mr. Smith for past services, and was not motivated by his future government employment. One of the Directors said Earle Jorgensen told him in a private conversation that Mr. Smith's situation was different from other resigning Directors because Mr. Smith would be making a financial sacrifice in accepting public service. However, that Director also emphasized that the payment was for "loyal and dedicated service" to the Company. There is no evidence that the Board sought to compensate Mr. Smith for the performance of official duties rather than for past services to the Company. There was no evidence whatsoever that Mr. Smith was told anything other than

the payment was intended as compensation for past services.

Analysis

18 U.S.C. § 209

Section 209 bars the receipt from private sources of "any salary or any contribution to or supplementation of salary as compensation for his services as an officer or employee of the executive branch of the United States Government . . . ." There is no pertinent case law under Section 209 or its predecessor and there has never been a prosecution instituted under Section 209 involving a payment such as the one at issue. What is clear from both the words of the statute and the legislative history is that the intent of the payment is crucial. If the payment was intended to supplement the salary of a government official, it would violate Section 209. If the intent was to compensate for past services, the payment would be proper.

Although there have been no pertinent prosecutions under Section 209, the statute has been interpreted by the Department's Office of Legal Counsel (OLC) in the context of rendering advisory opinions to persons entering government service. Typically, an entering official will describe a proposed severance payment to OLC and OLC will issue an advisory opinion deciding whether or not the proposed payment is consistent with the proscription in Section 209.

In issuing these advisory opinions, OLC relies on certain objective criteria rather than conducting an investigation into the subjective intent behind the payment. This practice is both necessary and appropriate because OLC does not have investigative resources and because it is concerned with the appearance of the transaction as well as the actual intent. Thus, although the OLC opinions are useful in considering the requirements of Section 209, they are not conclusive in the context of a criminal investigation when it is necessary to determine whether the proscribed intent is actually present. When viewed in the context of criminal liability and with the benefit of a full investigation into the purpose of the payment, it is clear that the payment here involved did not violate Section 209. Put simply, all of the relevant evidence supports the conclusion that the payment was intended to compensate Mr. Smith for past services.

Regarding the liability of Mr. Smith under Section 209, there is no direct evidence that he received this payment as a supplement to his government salary. Mr. Smith's first knowledge of the payment was when it was presented to him at the January 12 meeting with an explicit statement and resolution providing that it was intended to compensate him for past services. In addition, given (a) Mr. Smith's highly valued contribution to the Company over a six-year period, (b) the substantial profitability of the Company, (c) the relationship of the payment to Mr. Smith's overall income, (d) the statement of each Director that the fee was intended to reward past services, and (e) Mr. Smith's receipt of information from the Company that outside counsel had ruled favorably on the propriety of the payment, there is no basis to conclude that Mr. Smith accepted the payment with the understanding that it was supplementing his future government salary rather than paying him for past services. Nothing of the kind was ever communicated to Mr. Smith and the objective circumstances are insufficient to attribute such knowledge to Mr. Smith. Moreover, the overall evidence regarding the intent of the Directors supports only one conclusion—that the payment was intended to compensate for past services, not to supplement Mr. Smith's salary. When applying the standards of the criminal law to the facts, the evidence does not indicate a violation of Section 209 by Mr. Smith.

Special Prosecutor Provisions

The Special Prosecutor provisions of the Ethics in Government Act, 28 U.S.C. § 591, *et seq.*, are triggered by receipt of "specific information" that a person covered by the Act has committed a federal offense. 28 U.S.C. § 591(a). As Attorney General, William French Smith is a person covered by the Act. 28 U.S.C. § 591(b)(2) and (4). It is thus necessary to determine whether the information regarding the severance payment is specific information that Mr. Smith committed a federal crime.

At no time have we received any information, allegations, or evidence supporting a conclusion that Mr. Smith understood, believed or knew that the Jorgensen payment was intended to supplement his salary. While the objective circumstances known prior to the investigation perhaps presented the sort of issues that the Office of Government Ethics is normally and properly concerned with when it renders its advisory opinions, there was no specific information, credible or otherwise, that Mr. Smith accepted the payment with the proscribed knowledge and intent. The information developed during the investigation failed to support a reasonable inference of the requisite intent or knowledge and thus at no time has the Act been triggered.

Conclusion

Because the evidence fails to establish that the Jorgensen payment was intended to compensate Mr. Smith for his future government service as Attorney General, this matter does not warrant further investigation or prosecution. The Department of Justice has not received "specific information" of a federal offense by Mr. Smith and the Special Prosecutor provisions of the Ethics in Government Act are inapplicable.

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

HEARINGS ON MOTIONS

January 16, 1987

Before: Claude M. Hilton, Judge

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[2] THE CLERK: Civil action 86-829-A, the United States of America versus the Boeing Company, Inc., and others.

MR. SZYBALA: Good morning, Your Honor. I would like to introduce to the Court Mr. Robert Ashbaugh, Deputy Director of the Commercial Litigation Branch of the Department of Justice. And I respectfully ask that he be permitted to present the argument for the United States.

THE COURT: Your motion is granted.

MR. BENNETT: Good morning, Your Honor, my name is Robert Bennett on behalf of Boeing. I would just like to introduce Frances Wetzel and Mr. Benjamin Sharp, who are co-counsel with me in this matter.

THE COURT: Very well.

MR. KEITH: Your Honor, I am John Keith, representing the defendants Paisley, Jones, Reynolds and Kitson. And I would like to introduce Mr. Philip A. Lacovara of the firm of Hughes, Hubbard and Reed, and move his motion for purposes of this motion.

THE COURT: Motion is granted.

MR. KEITH: Also with me is Mr. Roger Fendrich, and I would also like to move his admission, of the same firm.

THE COURT: That motion is granted as well.

MR. TREANOR: Good morning, Your Honor. For the record, my name is Gerard Treanor, I represent defendant Lawrence Crandon.

[3] THE COURT: Gentlemen, I have read through what you have submitted, so I hope that you can keep it fairly brief, what you have to say.

MR. ASHBAUGH: Thank you, Your Honor. I am Robert Ashbaugh. With me is Miss Joan Hartman and Mr. Vince Terlep from the Department of Justice.

In 1981 and 1982 five Boeing employees left that company to enter federal service. Boeing paid them a total of $495,000, according to their chief executive officer, to encourage them to accept federal service, to take away the onerous aspects of federal service.

Does Your Honor have a copy of the appendix which the Government filed with our motion for summary judgment available?

THE COURT: I assume I do, and I am familiar with the facts. I would like for you to kind of get down to your argument and tell me why you think I can give summary judgment in this case. I am always a little suspect when there are cross-motions for summary judgment and each side is trying to resolve the facts. That usually means a controversy.

MR. ASHBAUGH: Your Honor, in this case both sides have moved for summary judgment. The record that you see before you now, consisting of the depositions and documents, is not likely to be significantly different from what you would see at trial. Many of the witnesses are from out of state. So, the deposition testimony is going to have to suffice.

[4] Basically, however, the reason why this is suitable for a motion for summary judgment is because the transactions that are at issue are documented on the paper.

Those transactions are in the appendix. And the critical first one, if I may approach, I would like to give the Court a copy of—

THE COURT: All right, the Marshal will get it for you.

MR. ASHBAUGH: For the record, these are pages A-209 through A-227 of the Government's appendix, with the exception of page A-213.

Your Honor, these are illustrative of the calculations which Boeing went through in computing severance payments. The individual that we have chosen to use is Mr. T.K. Jones who, according to the individual defendants, is typical. And because he was the first of the five to receive these payments, his process was a bit of a precedent setter in the company, although it has been making payments like this on and off for about ten years.

If Your Honor would turn to page 209, this is the actual calculation which Boeing undertakes when it attempts to compute the difference between what the government, what the employee is going to receive as a government employee, the salary that he is going to receive, and the emoluments that he would receive had he continued at Boeing for the next four years. Now, they chose four years because that represented the presidential term that the employee was entering at the time.

[5] The first thing they do is the loss in salary calculation. It is Boeing's salary in Mr. Jones' case of $71,000 minus his projected federal salary, which is 50,000, times four years, his expected what Boeing calls assignment with the government. They come out with a total of $83,000.

The next calculation in the process is a series of assessments of the various financial plans which Mr. Jones participated in while he was at Boeing. And the critical point here is that we are not talking about cashing out present interest that any employee departing from Boeing would be entitled to. These are company contributions projected over the next four years to those financial

benefit programs. And it is an effort to estimate how much they would be worth to Mr. Jones. Again, the total is $25,000.

The third item, it is relocation costs. Although the government paid Mr. Jones to move to Washington to take his job, Boeing subsidized his move to the tune of $3,500. In effect, Boeing was paying a terminating employee to go to another city to take a job with another employer.

The fourth item is the high cost supplement. When a Boeing employee is assigned to Washington, he is given a 10 percent cost of living allowance in addition to his scheduled salary to make up for the difference in living in the two cities. This same computation projected over the four years for Mr. Jones' service in Washington was built into the Boeing [6] computation. And they came up with a total of $132,000.

Now, this calculation was made by the assistant director of corporate compensation. It is submitted to the president of Boeing Aerospace. It is reviewed by a president of the parent company who is in charge of military affairs. And eventually it goes up to Mr. T. A. Wilson, who is the chief executive officer.

In this case the full $132,000 which was recommended based upon this prospective calculation was approved by Mr. Wilson. With respect to some of the other individuals, he decreased that slightly. But in this case it was a full amount.

The other two documents that I have handed to you—I am sorry, the other documents which accompanied this calculation are reflected in A-212 and A-210. A-212 is the cover memo. And it quotes with respect to Mr. Jones' severance and departure from Boeing after just finding an amount of money that Boeing proposed to pay, the other side of the coin, however, is the potential to Boeing of having T.K. return when this assignment is completed. The experience he will gain can only be of great use and worth to us. His increased knowledge of our product

lines, the operating methods of government, and the growth in stature and management technique after four years in the job will be of value to us on his return to Boeing. And finally it concludes, needless to say, having someone with his views will be help to us while he is in Washington.

[7] These documents, Your Honor, we submit leave undisputable the facts with respect to Boeing's role in this case and the type of payments that were involved.

THE COURT: Was there any contract for this employee that he had to return to Boeing?

MR. ASHBAUGH: No, sir. And it is not necessary that we establish that, because the law is much more, the law simply does not require that as one of the conditions for our cause of action.

THE COURT: Well, the fact that they used any formula that they wanted to to calculate severance pay, what makes that a supplement to income? The statute says he can't supplement his income while he is employed with the Defense Department, whoever he is working for, is that right?

MR. ASHBAUGH: Yes, Your Honor.

THE COURT: Well, whatever method they used to calculate severance pay, there isn't anything wrong with having severance pay, is there? The employee works for you for a number of years, and you have got a company policy you want to give somebody a bonus, you want to give them severance pay, you can give them anything you want, can't you?

MR. ASHBAUGH: Your Honor, the answer is this. A severance payment which only goes to a government employee is automatically suspect. The fact that this is a severance payment which—

[8] THE COURT: What makes it automatically suspect?

MR. ASHBAUGH: What makes it suspect is because of the potential violation of section 209 which is involved. The fact is that these were not severance payments in

the normal use of the word because they were not available to all employees, they were not based upon past services. And I would like to emphasize that for a minute. The documents that I gave you are the only contemporaneous paperwork that reflect Boeing's decisional process in this payment. There is not a single reference anywhere in there to past services of Mr. Jones. It is not possible from those documents to even figure out how long he worked for Boeing. There is no reference as to how he has assisted the company to grow and prosper. None of the indicia or evaluations that would be appropriate to a severance payment are in fact reflected in these documentation, in this documentation.

THE COURT: Well, suppose Boeing or some other corporations wanted to encourage people to go into government service and told their employees, anyone of you that goes into government service, we will do this for you, we encourage you to go. What is wrong with that? What makes that a supplement to income?

MR. ASHBAUGH: Your Honor, in this case what we have is Mr. T.K. Jones with a $50,000 payment from the federal government as his annual salary. Each of the four years that [9] he is working, that he is expected to work for the federal government, he is going to get an additional $33,000 from Boeing, according to this payment—

THE COURT: They didn't pay him yearly though.

MR. ASHBAUGH: They paid him a lump sum.

THE COURT: Which is paid to him up front.

MR. ASHBAUGH: Excuse me, Your Honor. They paid him a lump sum based upon a projected four year term. The fact that it was a lump sum rather than installments has nothing to do with the case, it is not relevant. The point, Your Honor, is that the statute creates an objective standard which prohibits this kind of payment.

What Boeing has done here is impermissibly blurred the lines between the individual's obligation as a federal

employee and his relationship with his, with Boeing. The law prohibits any kind of relationship which might impair the impartiality of a federal official. When such an official is receiving almost two-thirds of his income, well, 50,000 and 33,000, $33,000 of his total income per year from his former employer, the kind of integrity and true loyalty that the law requires as a matter of common law cannot be assured.

And the law is concerned not so much with what has happened. It is not necessary for us to contend or to prove here that there was preferential treatment involved or that the government suffered actual damages. All that is necessary is [10] to show this impermissible relationship and payment.

Congress enacted 209 expressly to reach this kind of situation. And if there is any doubt about the matter, I would like to quote from a Harvard Law Review article written by Mr. Roswell Perkins who was at the time that Congress considered section 209 the chairman of the special committee of the New York Bar which had worked with Congress over two years in the redrafting of these statutes. He says, the most important application of the outside compensation prohibition is the typical case where a corporate executive is asked to go to Washington and his corporation offers to pay all or a part of the difference between his present salary and his future government salary. It is clear that, and he is referring to section 209, precludes payment of this kind. I am reading from page 1137, 1138.

With respect to the individual employees, Your Honor, the other documents that I attached consist of 25 pages of handwritten notes by Mr. Jones going through the same calculations; that is, attempting to assess the financial loss that he will incur leaving Boeing and taking a job with the federal government.

If Your Honor would look at that, you would see that he bases his projections on the same premise that Boeing used, that he will serve for four years with the govern-

ment, and the document says, and return, and presumably to Boeing.

[11] THE COURT:,Well, what if Boeing's purpose in making severance payments to these people once they announce they were going to leave was simply in hopes that they would leave Boeing with a good taste in their mouth so that they would ultimately return instead of going somewhere else? Does that make a difference?

MR. ASHBAUGH: No, it does not, Your Honor.

THE COURT: Intent doesn't make any difference? It doesn't matter what Boeing intended to do with this situation, it doesn't make any difference?

MR. ASHBAUGH: Not in that sense, Your Honor. We are required to demonstrate the relationship between the calculation and the severance payment and the individual's federal service. Those documents do that. There is no question about it, that each side knew that the only assessment that Boeing was making was a monetary one to determine the expense and the loss of salary involved in going to Washington, taking a lower federal salary, and coming up with a way to compute that difference.

Now, with respect to Your Honor's question about intent, I would like to read from two cases. One of them is *United States versus Carter*, which is a Supreme Court case cited frequently in our brief. It was a case in which the government was allowed to recover the entire amount that Mr. Carter had obtained while operating a harbor renovation project [12] as a contracting officer. This is in response to your question about intent—

THE COURT: This was money that he received while he was a government employee?

MR. ASHBAUGH: That's correct.

THE COURT: All right.

MR. ASHBAUGH: The premise, the reason I am reading it though is for this quote. As a whole, the harbor improvement had been intelligently and scientifically carried out and was apparently an engineering success and within the appropriation allocated for it.

In this *Mississippi Valley* the same tenor is apparent from this quote, again from the Supreme Court. Impairment of impartial judgment can occur even in the most well meaning men. The statute attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

This is an objective standard. It is a per se prohibition, Your Honor. And questions of preferential treatment, of actual damage and similar kinds of requirements, simply are not part of this.

Your Honor, based upon the documents, the individual's personal involvement in the calculations, the fact that there is a total absence of any consideration of their past service for the company, the fact that this was a practice that was [13] only available to government employees—And in fact it was a practice that was very discretionary among high corporate government officials, I am sorry, high corporate Boeing officials, it was not a personnel practice that was even disseminated among Boeing employees, they learned about it through the grapevine—

THE COURT: Well, that is not an issue that you can rely on, whether or not Boeing is treating all of its employees fairly.

MR. ASHBAUGH: But the indicia of a proper severance payment plan suggests, and so does the statute, that where it is a severance payment spelled out in written procedures and involving contract rights that are available to the company's employees as a general proposition, that it will probably pass muster. My point is that with respect to every one of the indicia that you might look to to determine whether this is a proper severance payment, in this case Boeing fails.

One of the issues that the defendants had raised, Your Honor, is that section 209 does not involve a preemployment relationship. And again I cite—I cite to Mr. Perkins again to begin. This is a quote. The time

of receipt of the outside compensation is clearly irrelevant under the new act if the compensation is for government services.

It can be made clearer if you can compare how Congress addressed the general problem in Chapter 11 of Title 18. If [14] you look at section 201, 204, 205, 207, and 208, each of those prohibitions begins, whoever being an officer or employee of the United States. And then it goes on to state the substantive acts which constitute the prohibitive conduct.

Section 209, however, that limiting language is not there. It is whoever receives such a payment. And the legislative history which we have covered in our brief makes clear that that choice of words was intended by Congress to expressly reach payments that were made prior to the individual's status as a public official, so long as the other criteria were met.

Your Honor, that concludes my initial remarks, unless you would like, unless you have questions about the statute of limitations. Otherwise I simply ask that I be allowed a moment for a brief reply.

THE COURT: All right. I think I understand your position. I have read through the submissions that you have made, and I believe there are issues of material fact that are in dispute. And, therefore, your motion will be denied.

I don't know whether you gentlemen want to try or not, but I have read through your submissions and it seems to me that at this point in time the motions for summary judgment ought to be denied and this case ought to proceed.

MR. LACOVARA: Your Honor, may I just have a moment on the statute of limitations?

[15] THE COURT: You sure can.

MR. LACOVARA: Philip Lacovara representing the defendants Paisley, Jones, Kitson and Reynolds.

There is no issue of fact relating to the statute of limitations issue concerning the individual defendants.

The Government acknowledges that the statute of limitations began to run no later than March 1982. The complaint was filed in July 1986. There is an issue with respect to Boeing about whether the tolling agreement between Boeing and the Government preserves certain claims. There was no tolling agreement involving potential claims against the individual defendants. The Government does not allege there was.

The only issue, therefore, is purely a legal one, which is whether the Government's claim sounds in tort or in contract. The Government claims that a six year contract statute of limitations should apply. For the reasons that we have outlined in our brief, there is no basis for a contract claim on the facts even as the Government alleges them, because in substance there was no contractual relationship between the United States and any of these men when they received the payment.

Never has any Court suggested that there is a quasi contract that arises when an employee receives a severance payment from his current employer simply because he may be going to work for another employee.

[16] So, what we have suggested, Your Honor, and I think it is right for the Court to rule on it, is that if the Government has got a claim for breach of fiduciary duty. That kind of claim, as the Courts have said, is a tort claim and is covered by the statute of limitations that Congress has imposed for tort claims. And that is three years.

And on those facts at least, we believe that the motion of the defendants, the individual defendants for summary judgment on the basis of the statute of limitations should be granted.

THE COURT: Very well. Do you want to respond to that?

MR. ASHBAUGH: Your Honor, we had briefed the question with respect to the existence of an implied in law action for breach of contract arising from the employment relationship. The law takes these fiduciary

duties, the conflicting standards, these are implied into the employment relationship between the government and the individual defendants here. It is on that basis that we sued them as a breach of contract action, breach of implied contract action.

What Mr. Lacovara is raising, it seems to me, is at best again the contention that somehow conduct which precedes the employment relationship can't be the subject of this lawsuit. Our lawsuit begins when two things happen. And it doesn't matter in which order they happen, but both must happen. A, there must be the payment. And B, there must be the [17] employment relationship. If these individuals never joined the federal government, we would have no quarrel with Boeing's severance payment. Boeing might, but wouldn't. It is not until both happen that our cause of action accrues.

And what they have done by accepting that payment, according to the common law, is they have put themselves in a position which is absolutely inimical to the successful establishment of a true fiduciary duty. Because of that payment, they cannot achieve what the law expects of them. For that reason, our cause of action based upon contract should be sustained.

THE COURT: All right. I think as to this issue as well, it is not quite that clear-cut, I am going to deny your motion for summary judgment based upon the statute of limitations at this time without any prejudice for you to raise it at the time of trial.

MR. LACOVARA: Thank you, Your Honor.

MR. TREANOR: Your Honor, may the record reflect that the defendant Crandon joins in the motion that Mr. Lacovara brought on behalf of his clients?

THE COURT: The record will so reflect.

MR. BENNETT: Your Honor, on behalf of Boeing, 30 seconds. It is undisputed that in the case of Boeing, it is not an alleged even six year statute, it is a three year statute of limitations. And they are way beyond

the limit as [18] to the payments to Mr. Jones, Reynolds, Paisley and we believe Crandon.

And I would simply direct the Court's attention to undisputed facts that we filed numbers 33 through 45 and trial Exhibits 22 through 28. And those clearly show that the payments were well known to key government people who had management responsibility. The Government was tardy in that instance and has been tardy throughout this case, and we think we are entitled to judgment on it.

It is obvious Your Honor is not going to do that today, but we would ask you, if you would at some appropriate time look at the references that I have just given to the Court.

THE COURT: All right. I would be happy to look at them, but I think there is a question of the waiver as it relates to Boeing, and your motion will be denied.

HEARING CONCLUDED

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

TRIAL TRANSCRIPT

January 27, 1987

Before: Claude M. Hilton, Judge

Appearances:

Ronald Clark, Gordon Jones, Joan Hartman, Robert Ashbaugh and Dennis Szybala, Counsel for the Plaintiff.

Robert S. Bennett, Benjamin S. Sharp, Frances L. Wetzel, Philip A. Lacovara, Roger Fendrich, Paul B. Terpak, Andrew T. Karron and Gerald F. Treanor, Jr., Counsel for the Defendants.

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[2] THE CLERK: Civil action 86-829-A, the United States of America versus the Boeing Company and others. Counsel, are you ready?

MR. SZYBALA: Ready for the United States.

MR. TREANOR: Ready for defendant Crandon, Your Honor.

MR. LACOVARA: Ready for defendants Jones, Paisley, Reynolds and Kitson.

MR. BENNETT: Ready for Boeing.

MR. SZYBALA: Your Honor, if I may, I would like to present the Department of Justice attorneys who will arguing the case. This is Ronald Clark with the Commercial Litigation Branch, Mr. Gordon Jones and Miss Joan Hartman.

MR. BENNETT: Your Honor please, with me on behalf of the Boeing Company is Mr. Benjamin Sharp of the Washington, D.C. Bar, and Miss Frances Wetzel will be joining us shortly from my firm.

THE COURT: Very well.

MR. LACOVARA: Your Honor, I am Philip Lacovara for the four individuals. With me had this morning is Andrew Karron, Mr. Paul Terpak of our local counsel. And we will be joined by Roger Fendrich of my office as well. And I would like, Your Honor, to introduce the three of my clients who are with me in the courtroom this morning, Mr. T.K. Jones, Assistant Secretary of the Navy, Melvyn Paisley, and Mr. Harold Kitson, Jr. Your Honor, we will have a preliminary matter [3] about Mr. Reynolds' absence in a few moments.

MR. BENNETT: Your Honor, Mr. Michael Halber, the assistant general counsel of the Boeing Company is in court, and he is here as the personal representative of the company. May I introduce him to the Court.

MR. TREANOR: Good morning, Your Honor, Gerard Treanor for defendant Crandon. As a preliminary matter, I would ask the Court to accept for filing three documents which have previously been served on the Government. They are a summary of the deposition of Lawrence Crandon, a trial memorandum on his behalf, and his opposition to plaintiff's motion in limine which I understand seeks to exclude evidence relating to intent.

THE COURT: Very well.

MR. TREANOR: Thank you.

MR. BENNETT: Your Honor, Boeing has submitted to the Court this morning deposition excerpts which have previously been identified in accordance with the Court's pretrial order. Additionally, Your Honor, we will be filing this morning a short opposition to the motion in limine filed by the Government.

THE COURT: All right.

MR. LACOVARA: Your Honor, if I may, I also have some documents to be filed with the Court's permission. They have been served on Government counsel. They are the proposed findings of fact and conclusions of law for all five of the [4] individual defendants, including the defendant represented by Mr. Treanor; the trial brief for defendants, basically Jones, Reynolds and Kitson; our response to the Government's motion in limine; and our summary of the deposition testimony of Miss Janet Thompson who was a witness designated by the Government. With your permission, I would like to hand these to the clerk.

THE COURT: Very well, hand them to the Marshal.

MR. LACOVARA: Thank you, sir. And, Your Honor, I mentioned a moment ago that Mr. Herbert A. Reynolds, one of the defendants, will not be present this morning. He underwent serious surgery some time ago and is medically disabled. The Government counsel and I have agreed on a stipulation which we would tender to the Court which provides in substance that in light of the similarity of issues and facts, the parties agree that the disposition of this matter as to defendant T.K. Jones will also govern the Government's claim against Mr. Herbert Reynolds. That is acceptable to both parties, and counsel have signed a stipulation to that effect, with an attachment of a letter from his counsel.

THE COURT: Very well, pass those forward.

MR. TREANOR: Your Honor, the Court should be aware also that Lawrence Crandon, the fifth named defendant in the suit, who is a resident of Brussels, Belgium, where he is employed by NATO, will not be present during the course of the trial because of the distance and the expense involved.

[5] THE COURT: Very well.

MR. CLARK: May it please the Court, pending before the Court this morning is the Government's motion in limine. And we would ask the Court to consider granting that motion at this time for the reasons stated in the

brief offered in support of the motion. As indicated in the brief, principally the foundation of our motion in limine is that we believe and have cited authority to establish that a number of the propositions we think the various defendants will seek to adduce from evidence this morning are irrelevant, have nothing to do with the cause of action that has been brought before the Court in the form of the complaint, and as a result are not permissible, are not admissible under the Federal Rules of Evidence. And we would ask the Court to grant that motion at this point.

THE COURT: Well, I am going to deny your motion in limine. I of course am reserving any right to rule on any evidence that may be irrelevant. But it seems to me that the thrust of your motion would prevent any evidence concerning intent, method of payment. And it seems to me that I can't make that ruling in blank.

MR. CLARK: Very well, Your Honor. Would Your Honor wish to have an opening statement by the Government?

THE COURT: Well, that is up to you. If you desire to make an opening statement, I hope you would make it short. I [6] am somewhat familiar with the facts of the case.

MR. CLARK: Very well, Your Honor. As Your Honor is aware, this case involves allegations by the Government against one corporate defendant, Boeing, and five individual defendants, that they acted inconsistently with Title 18 U.S.C. Section 209(a) and the common law in connection with approximately $495,000 worth of payments made by the corporate defendant Boeing to the individual defendants in 1981 and 1982 and the retention of those payments by the defendants.

Through the process of live testimony, through deposition testimony, and through exhibits the Government will demonstrate through its evidence a series of facts. We believe the facts are doubly significant. First, the individual facts as they relate to the particular defendants.

We think it is also significant the pattern of facts that relates, that reoccurs over and over again relative to the particular defendants and the Boeing Company.

Your Honor, the evidence will show that in 1981 and 1982 the Defense Contract Audit Agency undertook an inquiry into the nature of certain overhead charges that had been made against or by Boeing against government contracts. In the course of making those inquiries the Boeing Company provided a number of documents in response. And ultimately as a result of the inquiry there was a report made on March 26, 1982, to the principal administrative contracting officer.

[7] You will hear testimony, Your Honor, this morning from Mr. Heyel from DCAA as to those facts. There is no dispute here that the payments were made, Your Honor. There also is no dispute, I think, that each of the recipients of the payments while at Boeing intended to leave and join the federal government, and did subsequently leave to join the federal government. Some to the Department of the Navy, some to the Department of Defense, some to very high levels, such as Assistant Secretary, basically from whom Your Honor will hear on our direct case this morning, our prime case this morning.

The case will also establish that each individual defendant while employed at Boeing submitted sheets to Boeing containing three principal types of financial data. First, a projection of benefits that individual would have received had that individual continued his employment at Boeing for a period of three or four years. The second type of data was the anticipated benefits the individual would receive should he go into the federal government. A third category of data was data as to vested rights, such as retirement benefits that had been vested, pay, that kind of thing.

Your Honor will hear this through a number of witnesses on deposition, and through Mr. Paisley this morning who will testify.

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Evidence will also show that Mr. Charles Hagberg, at that time assistant director of corporate compensation at [8] Boeing Aircraft Corporation in 1981, was instructed by superiors to codify existing Boeing practices to form guidelines as to how to compute payments for individuals who would go from Boeing to the federal government. And the evidence will show that these payments were only to individuals who sought employment with the federal government.

The evidence will further adduce that Mr. Hagberg developed a four step calculation. The first step, which I will indicate briefly, was a salary differential. By that I mean that, and Your Honor will see the exhibits later this morning, was a projection as to the difference between the salary the individual defendant would have received had he stayed on at Boeing minus his anticipated government salary, multiplied by the number of years that this individual anticipated he would be there at the government, usually it was three or four years, the remaining time in the current presidential term.

The second category of data related to other future benefits. By future benefits I mean benefits that the individual would have realized had that individual stayed employed by Boeing. And Your Honor will hear testimony relating to the financial security program, which involves essentially investments in terms of leave that accrued and the computations that would have been made had the individual stayed at Boeing. For the projected period of his anticipated [9] government service he would have realized a certain number, a financial number. The same for the voluntary investment program, a shared contribution where Boeing matches contributions of employees. A projection as to if the individual defendant had remained at Boeing, what he would have realized under the voluntary investment program for that same period of time. Also there was a third factor of unvested contributions that had not vested had the individual left Boeing, but computed as if they would vest just as if the employee stayed on at Boeing for that period of time.

The third factor that was used in Mr. Hagberg's formula as used by Boeing was relocation costs and assessment of assistance in terms of moving costs. The evidence will indicate, Your Honor, that the only categories of individuals who left Boeing that got this kind of assistance were those who went to work for the federal government. Not to any other employees, not to anybody else, only those who went to the federal government.

The final factor in Mr. Hagberg's formula was a cost of living calculation based upon Boeing's usual comparison between the cost of living in Seattle, Washington and Washington, D.C., which for most of these defendants was 10 percent.

In the case of Mr. Paisley, there was an additional calculation because of his high position in Boeing. Again, [10] projecting just as if Mr. Paisley continued on at Boeing rather than going to the government. This would be in terms of life insurance benefits and some costs or fees that would be paid for tax preparation.

Your Honor, the evidence will also indicate that there was an alternative contribution formula that was used for two of the defendants, Mr. Crandon and Mr. Kitson. That formula involved multiplying five percent times the current Boeing salary, and then multiplying this times a factor or a fraction anticipated years of government service over four. And the evidence will demonstrate how that was combined with the other computations.

Your Honor, the evidence will further establish that the industrial relations department at Boeing applied Mr. Hagberg's calculation formula to each of the defendants. That those initials calculations were in turn reviewed by Mr. Hagberg to make sure that they were in accordance with with his formula and methodology.

The record will also show that those recommendations went up the chain of command. That they were reviewed initially by Mr. Hebeler, who was president of Boeing Aerospace; in his absence by Mr. Miller, both of whom will testify by deposition. That both of those individuals,

Mr. Miller and Mr. Hebeler, relied upon the recommendation that came from the industrial relations department, they made no independent [11] determination. And the evidence will show that the recommendation from the industrial relations department had nothing to do, made no effort to quantify any past contributions that the employee had made to Boeing.

Then the recommendations would go up to Mr. Skeen, senior vice-president of Boeing, and then on to Mr. Little, vice-president of industrial and public relations. Both those individuals will testify by deposition, Your Honor. And Mr. Little in his deposition—And the evidence will show that Mr. Little relied upon, when he made his determination, just before he went in and reviewed them, before he went in and talked to Mr. Wilson, the chief executive officer of Boeing, that he understood that the figure that came up to him from the previous levels in the chain had a figure to include a salary differential. He understood that it involved the loss of future company matching funds for the investment account, and loss of past contributions, something to compensate for that, future sick leave credits, compensation for that, relocation expenses, and a high cost area supplement. The evidence will show that Mr. Little when he reviewed this as the final step before it went to Mr. Wilson had these assumptions. He knew this was the basis upon which the factors or the proposed payments had been calculated.

Finally, Your Honor, Mr. Little reviewed each and every one of the representations or proposals for payments with [12] Mr. Wilson, the president of the Boeing Company. Mr. Wilson, who will testify by deposition, his evidence will show, knew that included in that figure that he got was a differential between projected government salary versus anticipated Boeing salary had they remained. He also knew that it included moving expenses.

Mr. Wilson, the record will also show, was fully aware that there was no evaluation of past services as part of

the recommendation made to him. The recommendation had started at the industrial relations level, Your Honor, and gone up each successive level and was ratified. In fact, the evidence will show that Mr. Wilson didn't even know defendants Crandon or Reynolds, and therefore could not have assessed their past contributions to the company based upon his own independent knowledge.

The evidence will also show that Mr. Wilson generally, with the exception of Mr. Paisley, did not do any kind of significant adjustment to figures. The figures were rounded down a thousand, rounded up a few hundred dollars fundamentally. In the case of Mr. Paisley, the calculation was reduced by Mr. Hagberg again, but the calculation was simply taking the figure that Mr. Hagberg's group had initially recommended and applying a present value formula to it. So, it was still the present recommendation that had come up, it was just calculated in terms of present dollars rather than being projected out in [13] terms of investment.

The evidence will show, Your Honor, that the recommendations bear a very close similarity to the final payments that came up through the process step by step by step. That Mr. Jones had been recommended for 132,666, got $132,000 Mr. Reynolds got recommended for 82,987 and got 80,000. Mr. Kitson had been recommended for 59,310 under the original calculation. And as I said, there was an alternative calculation that yielded 34,000, but Mr. Kitson still ended up with $50,000. Mr. Crandon had also two, 52,260 for the Hagberg calculation. The alternative, 19,311. But the result was 40,000. And of course Secretary Paisley ended up with the present reduced value of his, $180,000 plus an additional $3,000, the evidence will show, based upon a period he served as a consultant prior to assuming his current position.

The record will also indicate, Your Honor, and the evidence will establish that these individual defendants also received payments, separate payments for traditional severance payment items, such as unpaid salary, remaining vacation, what they had vested benefits in the individual accounts, the voluntary investment program, the financial security program, the value of their sick leave. They got a separate check for these in addition to the check they got as a result of the computations that worked their way up to Mr. Wilson.

Finally, Your Honor, the evidence will indicate that [14] the Boeing Company charged in its general and administrative account as part of its overhead costs the payments that were made to these individual defendants. And that after the discovery of the payments, and after the inquiry had gone on, that Boeing withdrew the charges themselves from the overhead. But the evidence will establish that they can still reassert those charges depending upon the outcome of this lawsuit. And that the evidence will further establish through testimony of Mr. Heyel that the government was without the use of that money for the period of time between the initial overhead charge and when the charge was withdrawn from the overhead charges. And that the evidence will show that the government as a result suffered an interest loss of $74,409.

In short, Your Honor, the evidence the Government will adduce at trial will demonstrate that these payments were made only to individuals who went to the federal government. That they were entirely discretionary, were made to no other kinds of employees. That they were entirely prospective based upon anticipated future salary and benefits from the government compared with projections of benefits that would have been received had they continued as employees at Boeing. That each of the individuals gave sheets to Boeing to assist Boeing in computing the payment utilizing the four prospective factors that Mr. Hagberg had incorporated into his formula.

And also the evidence will show, Your Honor, that the [15] individuals received separate payments for what we would consider to be traditionally vested benefits, vaca-

tion due, sick leave due, separate payments from the payments of the focus of this action.

I thank the Court.

MR. BENNETT: Your Honor please, Robert Bennett on behalf of Boeing. Your Honor, I will be very brief. I would like to try to put this a little bit in perspective because I think listening to the opening statement of the Government and comparing it with the complaint in this case, there is very little similarity.

This is a case in which the Government has brought a tort action based on a criminal statute. I should add, Your Honor, and it is undisputed, and part of our stipulation is that there has never been a prosecution criminally under 18 U.S.C. 209 for severance payments. And moreover, the Government acknowledges and admits in the stipulations, in the response to our request for admissions in particular, that they have never brought a severance pay civil suit based upon that statute without regard to the calculation or without amount of payment or whatever.

So, what we have here is really, when you strip it all away, a test case. They are asking this Court, and this is what we defendants particularly object to, they are asking this Court to create law, to do what the Congress could do, or to do [16] what the regulatory body, the executive could do.

It is undisputed in this case that there have been no severance payments since 1982 when the Government first raised a complaint about it. The company said, fine, wait, tell us what kind of severance pay policy you want. Essentially, Your Honor, that also is an undisputed fact. If you look in our Exhibit 50, that we promptly discussed both with the Department of Justice and the Department of Defense, say, hey, fellows, you are coming after us for our people, if you don't want severance payments, tell us, if severance payments are all right, you tell us what the rules are.

That's how this should be resolved, Your Honor, not by way of this lawsuit, because this lawsuit is a very

vicious lawsuit. It is a lawsuit which charges, notwithstanding the very sanitized opening statement, it is a lawsuit which charges that my client, the Boeing Company, made illegal payments. It is a lawsuit which claims that the individual defendants, very distinguished public servants, accepted improper and illegal payments. It is a lawsuit which has as its core the allegation that the Boeing Company created a conflict of interest situation where these individual defendants were in a situation where they were wearing two hats and not serving the United States Government.

Notwithstanding the fact, Your Honor, that the undisputed facts are that there was not one iota of favoritism [17] and that these men acted in a very honorable fashion.

In fact, Your Honor, the more appropriate title of this case should be the Commercial Litigation Branch of the civil division of the Department of Justice v. The United States Department of Defense, the United States Navy, Boeing, and the individual defendants.

So, I would ask you to please keep that in perspective, Your Honor, in making an ultimate ruling in this case.

We are going to show without any question that the purpose of these payments was certainly not to compensate government employees or supplement their salaries. These were payments made by a private company to private individuals, people who had absolutely no fiduciary duty to the United States Government. It was done consistent with a practice of the company to encourage public service.

It is incorrect to say it only applied to federal government people. The practice essentially was that if you were required to sever your relationship with the company, then you were eligible for a payment. The evidence is going to show that we helped people locally, we helped people go to the states, people went to the academic world. In those instances where total separation was not required, severance payments were not made, but Boeing

would give people leaves of absences or keep them on the payroll.

In the federal government, to avoid conflicts of [18] interest, a total separation is required. And that's why termination payments were given.

I think the final point that I would make is that I honestly don't know how the United States Department of Justice can come before you and say that the understanding of the individuals, the understanding of the company as to the purpose of the payments and the intent, the subjective intent in their minds is irrelevant and has nothing to do with this case.

The only time to our knowledge the United States Department of Justice has analyzed the issues here was in the case of William French Smith, who before he became Attorney General of the United States received a $50,000 lump sum severance payment based on being on a board of directors for only six years. And we note, and it is part of our materials we have submitted to the Court, the Department of Justice in exonerating Mr. William French Smith said there is no pertinent case law under Section 209 or its predecessor and there has never been a prosecution instituted under Section 209 involving a payment such as the one at issue.

What is clear from both the words of the statute and the legislative history is that the intent of the payment is crucial. And I think by the time we finish, Your Honor, you will be satisfied that the intent of this case was honorable and nothing else.

Finally, Your Honor, on the calculations, it is much [19] ado about nothing. As I indicated, and it is just not in dispute, if they tell us they want us to calculate it differently, we will calculate it differently. If they want us to say, as it would appear occurred in the *Smith* case, well, for six years you can get a $50,000 payment, if they want us to do it that way, we will do it that way. Of course, the end result would be Mr. Paisley might get a $300,000 severance payment and Mr. Jones might get

a two or something. The formula is of no particular significance. It is elevating form over substance, if Your Honor please.

The clear evidence is going to show that the higher-ups in the company based their decisions on what they considered to be a reasonable payment. The people down in the bureaucracy of the company, in industrial relations, used these formulas, which admittedly had forward looking aspects to them, to come up with some kind of a number to get their hands on the problem and present it above. There are all sorts of calculations. It is unclear which calculations were followed. Mr. Paisley had a calculation that came out to $800,000. Mr. Jones had a calculation that came out I believe in excess of 200,000. So, the calculations are of no real significance.

What is significant and I think what what we will clearly prove to you in this case, or the Government will fail to prove to you, is the purpose of all of this was to encourage public service and to have a total separation of these [20] individuals from the company prior to the time they went on to the very distinguished public service that they subsequently engaged in.

MR. LACOVARA: Your Honor, I represent accountants frequently in civil litigation, and during the Government's opening statement I had to shake myself to convince myself that I wasn't in an accounting case again.

This is a case charging my clients with engaging in unethical conduct, illegal conduct, breaching what the Government claims was a duty of undivided fiduciary loyalty, engaging in what they call, for want of a better or more accepted term, a breach or potential conflict of interest situation.

As Mr. Bennett just said, that's what the Court has to focus on in hearing the facts today. And I think you will find that the relevant facts completely dispel any accusation of unethical or improper behavior on the part of my clients.

What you had here were men who were employees of the Boeing Company. They were considering whether to accept government employment, if ultimately offered to them. They were aware that there would be financial impacts to leaving Boeing if they did that. They compiled a variety of types of financial impact. Some of them are of the type that the Government focuses on. We consider that irrelevant legally, but it is true as far as that goes. But they also considered [21] some that are retrospective.

Again, the Government tries to mask that. Again, we don't emphasize to you that that is dispositive, but it is illustrative of the fact that these men were not engaged in trying to solicit compensation from Boeing for performing government services. That was not the intent at all. They will assure the Court quite incredibly on that fact.

These were people that participated in a program that as far as they knew was available only to Boeing employees. It was not a situation where a company was adopting a government official. This was part of the relationship between Boeing and its own employees.

There has never been a litigation, civil or criminal, in which that kind of relationship has been attacked as criminal or unethical, and we have demonstrated that Congress never intended that it should be. There has never been a case in which the financial relationship between an employer and its own employees has been regarded as breaching a fiduciary duty to a prospective employer.

And in this case, as the evidence will show, at the time each of these men submitted the materials that the Government makes so much of, and indeed at the time they received the severance payments, they were Boeing employees. And none of them, none of them had any right or expectation that he would actually ever become a government employee. That [22] is conceded by one of the Government witnesses, Miss Janet Thompson, and we will have her deposition offered into evidence.

What you have then, Your Honor, as Mr. Bennett suggests, is a situation where these men behaved in all respects honorably. You will also hear evidence that when government officials suggested that there were other aspects of the conflict of interest laws that might apply, they zealously and vigorously complied with all of those conflict statutes.

You will hear evidence from Mr. Jones, for example, as well as Mr. Paisley, that they fully disclosed both before they entered government service and afterward that they had received these severance payments, including to counsel for the Department of Defense. At no time was it suggested to them that this technicality of how Boeing may have made the payments would separate a legitimate severance pay program from an illegal one.

You will hear that all of their superiors in the Defense Department, and we will have Secretary John Lehman this afternoon on behalf of two of these gentlemen, as well as the superiors for the others, that they all rendered outstanding public service, without any hint of favoritism, despite the awareness by their superiors that they had received severance payments from Boeing before they entered government service.

So, what we have, Your Honor, is what I would consider to be a case of classic overreaching on the part of the Justice [23] Department, trying to use these honorable men to make a test case to turn the law upside-down and to treat what was perfectly proper in retrospect somehow unethical. I trust when the Court hears all the evidence the Court will reject that effort.

Thank you.

MR. TREANOR: May it please the Court, Gerald Treanor for defendant Lawrence Crandon.

Your Honor, when we appeared before you a week ago Friday to argue the cross-motions for summary judgment, the Court believed that based upon the submissions at that time, that there may well be material facts in dispute which facts would make inappropriate the grant-

ing of summary judgment to either side. You have heard now this morning from Mr. Clark the Government's evidence. You have heard him describe what it is the Government intends to present to you by way of evidence.

I think then it is appropriate at this point on behalf of my client, Mr. Crandon, to ask the Court to grant our motion for a directed verdict based upon the summary of evidence that has been presented to you this morning by Mr. Clark. I believe that the evidence viewed in the light most favorable to the Government's position does not establish a cause of action, either at common law or by statute, that would permit a finder of fact to render a judgment against Mr. Crandon. And accordingly, I would make the motion for directed verdict.

[24] THE COURT: Well, I will defer ruling on that until I have heard the Government's evidence.

MR. TREANOR: Thank you. If the Court please, with regard to the position of defendant Crandon, I would adopt the arguments, the opening statements made by Mr. Bennett and Mr. Lacovara. While adopting those statements, and in joining the summary of evidence presented by each of those gentlemen, I would, however, ask the Court to consider that while the Government counsel with great facility refers to the individual defendants, there are indeed characteristics relating to my client, Lawrence Crandon, that do not apply to the other individuals and, of course, because of his situation do not apply to the Boeing Company.

I would only suggest, in joining with the opening statements of my brothers, that the Court take into consideration in viewing the evidence presented by the Government, and in understanding that in bringing this suit and in presenting this evidence against my client, the Government is alleging a conflict of interest, a breach of fiduciary duty, and violations of the common law and statutory provisions. In spite of those assertions by the Government, I would ask the Court to continue to keep in mind as you hear their evidence, that even as we

speak today, my client, Mr. Crandon, continues to be employed in a high security position with the North Atlantic Treaty Organization, and that his position with NATO [25] in the air control area of NATO is sponsored by the United States Government through the Department of Defense.

And I suggest to the Court with respect to my opposing counsel, that the proof of the pudding is in the tasting. If indeed there is evidence of a breach of fiduciary duty, if there is evidence of a conflict of interest, I ask the Court and I ask counsel to try to provide the answer to the question, if that is so, why is Mr. Crandon today serving faithfully and honorably in a position of great importance to this country.

Thank you.

THE COURT: All right. A couple things I would like to clear up in my own mind. While I have looked through this file, I don't claim to have gone through all of it at this point. Does the Government make any claim that they have a cause of action for breach of contract? Is this solely a tort case dealing with a breach of fiduciary duty?

MR. CLARK: No, Your Honor, against the individual defendants it most certainly is based upon the contract implied in law as indicated in the *Jankowitz* decision of the Court of Claims which we have cited in our briefs.

THE COURT: All right. Is there any dispute as to what law applies in this case?

MR. CLARK: Your Honor, I think from the Government's standpoint the law is very clear. We have cited *Mississippi Valley*. We have cited cases, other cases in support of our [26] propositions. The point I think I would emphasize to the Court at this point is that we are dealing here with a conflict of interest statute. It is a device which by it's very nature is designed to be preventive. It doesn't require proof of injury to the Government. It doesn't require proof of any type of

malicious intent. It is an objective intent, that is what the Supreme Court has said in characterizing these kinds of statutes.

I have been struck in reading the briefs filed by the various defendants in connection with the summary judgment motions that were filed last week that they keep pointing to this case and say that there is no evidence of secret payments here, there is no evidence of some kind of, some sort of evil intent, there is no evidence of some sort of corruption. That is not what this case is about. This case is predicated upon 18 U.S.C. 209(a). It talks about preventing a situation where even the most well intentioned men, this is what the Supreme Court said in *Mississippi Valley*, that the most well intentioned men can go into a situation fraught with danger. Congress has made the determination that that kind of situation ought to be avoided at the outset. And our cause of action is predicated upon 209, the common law approach, and upon essentially the nature of the fact that we are dealing with a preventive—

THE COURT: What I am trying to find out is whose [27] common law applies. Virginia common law? The suit is in Virginia.

MR. CLARK: Well, it is not a—Federal common law would apply. It is not a Virginia state law. It is not a tort case to begin with against the individual defendants, to answer Your Honor's question.

THE COURT: It is not a tort case against the individual defendants?

MR. CLARK: No. Boeing, different category, yes.

THE COURT: It is your allegation that it is a breach of contract case against the individual defendants only, not a tort case?

MR. CLARK: That's correct, Your Honor.

THE COURT: And as to Boeing, it is both a tort and a breach of contract?

MR. CLARK: Just a tort action, Your Honor, against Boeing. The argument against Boeing, the allegation against Boeing is that Boeing by the act of making these payments and in the way that they calculated these payments—And I would certainly say that, contrary to Mr. Lacovara, that how the payments are calculated is not just a meaningless fact, that is the whole central question here, that by the way they were calculated Boeing induced a breach in the fiduciary obligations that these individual defendants owed the federal government.

THE COURT: And that the individuals breached their [28] contract, a duty that they had under the contract?

MR. CLARK: Yes, Your Honor, the contract implied in law by accepting the payments, the duty defined by Section 209 which says payments of compensation in connection with services shall not be allowed. Congress has made that determination already. That no matter what justification is offered for that, no matter how illustrative the motive or purported motive may be, Congress has made a determination that that presents a danger to the fundamental integrity of the governmental process.

THE COURT: I understand that allegation you are making. I am trying to get in my mind what cause of action you are pursuing and against whom. And it is breach of contract against the individuals and a tort of breach of fiduciary duty against both?

MR. CLARK: I can also add, there is a subsidiary contractual action against Boeing in the sense of the allegation that the money, that was lost interest that the government suffered in the period of time between when the payments were charged to overhead and when the Boeing Company withdrew those payments, that those were improperly made, therefore the government suffered

a loss as a result of Boeing having that money during that period of time.

THE COURT: And you want to recover that under a breach of fiduciary duty theory?

MR. CLARK: The $75,000?

[29] THE COURT: Yes.

MR. CLARK: No, that would be under a breach of contract calculation. Boeing breached its contract by charging impermissible payments to the overhead. The fundamental cause of action against Boeing is fraudulently inducing these individual defendants to breach their duty of fiduciary obligations, and the action against individuals is a contract action that they did breach their fiduciary obligations and the contract implied in fact by accepting the payments. Boeing by making the payments caused them to induce the breach, they in fact did the breach as a result of receiving the payments.

THE COURT: And you say there is a federal common law that applies that I have to be guided by? It is not Virginia law?

MR. CLARK: No, it is federal common law as we have cited the authorities in our brief, Your Honor. It says that the, it says—The authorities we have cited, Your Honor, say that you can define the obligation that the individual employee has through a statutory basis. That's what 209 does.

THE COURT: Well, it depends upon whose law I start out with though, doesn't it? Or it could potentially have an effect. Let me hear what the other side has to say about those two questions I have just asked.

MR. LACOVARA: Your Honor, for the four of the five individual defendants, I think it is pretty clear the [30] Government is still in search of a theory even on the morning of trial. On the subject of whether the claim against the individual defendants is a tort claim or a

contract claim, the Government has tried to argue it both ways in its papers. It said, as is traditional, that a breach of fiduciary duty is a tort. We pointed out in our motion for summary judgment that if that's the Government's theory, the case was barred by the statute of limitations several years ago, because there is a three year statute of limitations.

The Government therefore has responded--

THE COURT: I don't mean to cut you off, I don't wanted to argue a motion for a directed verdict or reargue the motions we have had before.

MR. LACOVARA: I understand, Your Honor.

THE COURT: I guess the thing I really want to know from you is what law you think applies.

MR. LACOVARA: Your Honor, the contract claim raises a good many uncertainties in my mind for the simple reason that there is no case that either side has been able to come up with that establishes what the underlying basis for the claim is. There is, as the Government counsel just put it, federal common law authority at least where government employees accept illegal payments, bribes. There is a federal common law right by the government to recover that. That is as far as the cases go. They attribute to the federal employment/employee [31] relationship some kind of implied contractual duty. The *Mississippi Valley* case which the Government has sprinkled so frequently through its cases and the *Jankowitz* case are cases exactly of that sort, that a statute, not 209, a statute applies to an incumbent federal employee.

THE COURT: Does Virginia law have any application in this case?

MR. LACOVARA: I think Virginia law or Washington State law would probably be the only applicable law because when these severance payments were made, none of these men were a government employee. So, our

position is that you can't really look to federal common law governing the federal employment relationship to govern the legality of these payments because these men weren't federal employees.

And therefore, if the Government has got a claim based on contract, it has got to look to some kind of implied contract that arose when they accepted payments from their current employer, Boeing, when they might at some point establish an employment relationship with another employer, namely the United States Government, Your Honor. But I have to confess the same uncertainty that I think my co-counsel here would acknowledge, and that is we still don't know what the Government's theory is. If it is federal common law, the claim is barred.

THE COURT: All right, we will get that figured out in [32] in a little while. I would like to know whose law applies in this case. What law applies in this case?

MR. BENNETT: I guess our puzzled look is that the complaint that was filed in this case is a lot different from what we are now hearing. I am willing to take a shot at it and say that counsel said that my client, the Boeing Company, fraudulently induced a breach of fiduciary duty. I think, and I am very pleased to have the case tried on that basis, and I think that, I think the cases that they cite like *Continental Management* and *Mississippi Valley* and *Carter* would be cases which are appropriately relied on if that's the case that they intend to prove. They were all bribe cases, kickback cases, and people wearing two hats. And I think that that is pretty good law and I would not disagree with those cases if this was a bribery case or a kickback case.

THE COURT: Does Virginia law have any applicability?

MR. BENNETT: I don't think so.

THE COURT: To your client?

MR. BENNETT: I don't think so. Not against my client, because they are claiming a fraudulent, to coin, to repeat what he just said, they are claiming fraudulent

inducement to breach the individual defendants of their fiduciary duty. And I think that would be covered by the cases that they cite, even though they are totally inapplicable to the facts.

THE COURT: Let me hear Mr. Treanor.

[33] MR. TREANOR: Your Honor, I think with respect to defendant Crandon we do believe that there should be applied Virginia law to the question as defined by Mr. Clark, and that is whether there exists a contract in law. And we are confident that when the evidence is heard or when the Court believes it has heard enough evidence to rule on the motion for directed verdict that we have made, I think the Court will quite easily see that there were no enforceable rights or obligations on my client as a government employee at the time the payment was made and accepted.

THE COURT: All right.

MR. CLARK: Your Honor, I don't wish to undertake to rebut, but if I said, I don't think I said, but if I did say anything about fraudulently inducing, I certainly should stand correct out of my own mouth. I am talking about any fradulent inducement. I am talking about the act of making payments inducing the individual defendants to breach their contract. If I said fraud, I apologize to the Court because that is not what I meant to say.

As to the fundamental question that Your Honor is asking, we have cited *United States versus Kearns* in our brief. The Government's position is federal common law governs this contract implied in law. We have cited the authority. There is no rule for the law of Washington or Virginia, it is federal common law matter that is the basis for implying the contract [34] in fact.

THE COURT: How many witnesses do you intend to call?

MR. CLARK: Your Honor, we intend to call two witnesses to testify this morning, Mr. Heyel, the auditor from DCAA, and Mr. Paisley, one of the defendants.

And the rest of the Government's testimony will come in through deposition testimony, Your Honor.

THE COURT: All right. Now, I have looked through the stipulations of fact, and it seems that a lot that we have gone through in opening statements of how these payments were made and calculated have been covered by the stipulation. And it would seem to me that whatever evidence you put on would not need to be duplicative of that. We don't have a jury here. So, whatever you want to put on in addition to the stipulated facts, do so.

How many witnesses do you all have?

MR. BENNETT: Boeing may have one witness, Your Honor, depending upon what the Government's case is like.

MR. LACOVARA: Your Honor, we will be calling each of the three available defendants, plus about three other witnesses about their actual performance of government service. Those government employee witnesses will take no more than ten minutes.

THE COURT: About their performance in government service?

[35] MR. LACOVARA: Yes, sir.

THE COURT: Do you stipulate that their performances have been good?

MR. LACOVARA: We have offered that as a request for admissions. The Government has given what the magistrate found was an equivocal statement that could be construed as a denial of that because the Government says it is not relevant and they wouldn't therefore stipulate to it.

THE COURT: Is there any dispute that the performance of these defendants has been, has been nothing but good?

MR. CLARK: Your Honor, let me address the first point first. I am not aware that there is any stipulation that has been signed by the parties.

THE COURT: Well, there have been some stipulated facts that have been presented. You may not have signed them. There is something I got that was labeled stipulation of facts that I looked at the first thing this morning.

MR. CLARK: That has not been executed by the Government.

THE COURT: You haven't agreed to that?

MR. CLARK: No, sir.

THE COURT: Did you all look through the facts to see what you would agree to and what you didn't.

MR. CLARK: Yes, I think Mr. Jones can address that point since he was involved in the case at that point.

[36] MR. BENNETT: Your Honor, I can clarify it. When the Government would not enter into the stipulations that we felt they should enter into in accordance with the pretrial practice of this court, we submitted to the Court as our Boeing Exhibit 50 our request for admissions and their responses. Many of which are admitted. And I believe that if you read the request for admissions and their responses as to the performance of these gentlemen, I don't think the Government can in good faith dispute that they served honorably and in accordance with your question.

MR. LACOVARA: Your Honor, in addition, we have put in a series of admissions, and I mentioned them, they are Exhibit 154 submitted to the Court. I mentioned a moment ago that we had a hearing before the magistrate on the adequacy of the Government's responses. And the magistrate said, the transcript is quite illuminating, that the answers seem not to be in the spirit of the rules, but if the Government wanted to deny these things and disprove things at trial even though there didn't seem to be any evidence to counter them, the Government would have the financial burden of reimbursing the cost of proving those matters.

I do want the Court to be aware as well that on the question of what the supervisors of these men would

testify to, it is not only the adequacy and loyalty of their service, but also the disclosures that were made about the receipts of the [37] severance payments, both before and after.

THE COURT: All right, let me get back to this statement of facts. Did you look at the statement of facts that I looked at this morning? Was that statement presented to the Government?

MR. JONES: I am not sure, Your Honor, exactly what statement it is that you are looking at. There was a proposed set of stipulations that the defendants drew up at the time of the pretrial that the Government did not sign. Our position was that the responses to—They merely repeated many of the request for admissions. And our response was that our admission responses were sufficient, and that those that we could not admit we were not willing to stipulate to.

We think that those matters concerning the disclosure and concerning the quality of the individual defendants' service with the government are not material to our cause of action or to any defense that they might raise.

THE COURT: I can understand that. Now, the rules over here require the parties to get together and enter into stipulations. And one of the reasons for that is so that I don't have to sit here and go through admissions of who admitted what and who didn't admit what. And there should have been some attempt to go through these stipulations so that that would have been here for me before this trial started.

Now, the question is at the moment, is there any [38] dispute about the performance of these gentlemen that are defendants in this case?

MR. JONES: We—The answer to that is that we do not intend to put on any evidence to impugn their performance.

THE COURT: My question is, is there any dispute that their performance has been anything but good while they have been with the government?

MR. JONES: There is no dispute. Our position only is that it is irrelevant, Your Honor.

THE COURT: All right. Who is your first witness?

MR. CLARK: The Government calls Mr. James Heyel, Your Honor.

NOTE: The witness is sworn.

JAMES N. HEYEL, a witness called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. CLARK:

Q. Mr. Heyel, could you please state your full name and address for the record.

A. James N. Heyel, H-e-y-e-l, 11414 Southeast 180 Place in Renton, R-e-n-t-o-n, Washington.

MR. CLARK: Can Your Honor hear the witness? Is he getting up into the microphone?

[39] THE COURT: You go ahead.

Q. Mr. Heyel, by whom are you currently employed?

A. The Defense Contract Audit Agency.

Q. How long have you been employed by the Defense Contract Audit Agency?

A. 21 years.

Q. Can you briefly— Am I correct that the Defense Contract Audit Agency is sometimes referred to as DCAA?

A. Yes.

Q. Can you briefly explain to the Court what DCAA does relative to Boeing's contracts to the government?

A. DCAA audits forward pricing cost proposals, and also audits costs incurred on government contracts to assist the contracting officer in determining the reasonableness, allowability and allocability of costs on those contracts.

Q. What is your current position with DCAA?

A. I am a resident auditor.

Q. What does a resident auditor do?

A. Resident auditor supervises a field office.

Q. During the time frame of 1981 to 1982 what position did you occupy with DCAA?

A. I was branch manager of the Puget Sound branch office.

Q. What did you do, briefly, in that position?

A. Same position.

Q. That is you supervised?

[40] A. Yes, I supervised about 30 officers.

Q. Can you give the Court a brief indication of your educational and professional background?

A. Yes, I have a B.A. degree from Seattle University—

MR. BENNETT: Your Honor, we will stipulate that he is qualified.

MR. TREANOR: He is qualified.

THE COURT: Why don't you move along and let's get down to what the case is about, what he did as far as this case is concerned.

MR. CLARK: Thank you, Your Honor.

Q. Was there a point in time when you became aware that DCAA was conducting an inquiry regarding termination payments that had been made by Boeing Aerospace Company?

A. Yes. On about 19 November 1981 Douglas Freimuth, the resident auditor at the Boeing Aerospace Company, telephoned me and indicated that certain payments had been included in the general and administrative expenses pool with no associated hours. They had made inquiry at the divisional level and were told that these payments were termination or severance payments, but that to obtain the information behind these payments they would have to go to the corporate officers. At that time that was my responsibility.

Q. What did you do as a result of your conversation with Mr. Freimuth?

[41] A. We contacted the corporate financial representative and made verbal inquiries about the nature of these payments.

Q. What response did you receive as a result of your oral inquiries?

A. They requested that we put our questions in writing.

Q. Who is they?

A. Mr. Koester.

Q. Who is he employed by?

A. He is employed by the Boeing Company.

Q. What did you do then?

A. We drafted up some what we call action item requests, which are audit questions that we draft up, that we place in writing and then look for a written response.

Q. I would like to show the witness what has been admitted against Boeing Company as Government's Exhibit 50, Your Honor. I have a copy for the Court should you wish to avail yourself of it.

Mr. Heyel, have you had a chance to look at Government's Exhibit 50?

A. Yes.

Q. Do you recognize that document?

A. Yes. It is an action item request dated 14 December 1981 addressed to Mr. Koester, and the subject is termination pay.

Q. What is an action item request?

[42] A. An action item request is an audit technique that we use to document certain inquiries involved in our audit work.

Q. And why did you address this to Mr. Koester?

A. He was our liaison person in the finance group within the Boeing Company.

Q. Did you receive any kind of written response from the Boeing Company in response to Government's Exhibit 50?

A. Yes, we did.

Q. I would like to show the witness what has been labeled or has been admitted against Boeing Company as Government's Exhibit 42. Again I have a copy for the Court if the Court should wish to follow along.

Mr. Heyel, have you had a chance to look at Government's Exhibit 42?

A. Yes.

MR. CLARK: I might also indicate, Your Honor, for the record, that this is Boeing Exhibit 25.

Q. Do you recognize this document?

A. Yes.

Q. When did you receive this document?

A. It was received about January, the date object it is January 5, 1981, but that date should be 1982.

Q. How do you reach that conclusion?

A. Well, it is in response to our action item dated 12-14-81.

[43] Q. Did you receive this document, Government's Exhibit 42, from Boeing in response to Government's Exhibit 50?

A. Yes.

Q. What did you do after you received Government's Exhibit 42 from the Boeing Company?

A. We had further discussions with Mr. Freimuth and his review of these payments.

Q. What did you do as a result of your conversations with Mr. Freimuth?

A. We sent out another action item request.

Q. I would like to show the witness what has been admitted against defendant Boeing as Government's—

MR. BENNETT: Excuse me, Your Honor, I don't have any objection to these coming in, but he says they are admitted against Boeing. It is admitted in the case involving Boeing, but we don't feel that these are against us. Most of these are our exhibits.

THE COURT: I understand. You can argue that at the proper time.

MR. CLARK: I am only trying to—

THE COURT: Let's move along. Whatever you want to put in.

MR. CLARK: Very well.

Q. I would like to show you what has been marked as Government's Exhibit 51. Now, can you identify this document, [44] Mr. Heyel?

A. Yes. It is our action item 82-1, addressed to Mr. Koester, and again the subject is termination pay, dated 12 January 1982.

Q. Do you recollect what question or what piece of information led you to seek to put the questions that are in 51, Government's Exhibit 51, to Boeing? Why did you ask them what is represented in 51?

A. Well, we wanted to know why these costs were being charged against the Boeing Aerospace Company, which is the prime government division. In other words, if these costs were charged at the corporate level, only about 20 to 25 percent of the costs would have flowed to government contracts. But including it in the Boeing Aerospace Company over at the G&A expense pool, about 95 percent would have flowed to government contracts.

Q. Did you receive a response to Government's Exhibit 51?

A. Yes, we did.

Q. I would like to show the witness Exhibit 44.

THE COURT: Mr. Clark, is this witness solely to put on exhibits and to testify concerning how Boeing computed these payments?

MR. CLARK: Yes, Your Honor. The documents provided by Boeing in response to the questions—

THE COURT: Well, from what I understood in your [45] opening statement and what I read in the stipulation of facts, there doesn't seem to be any difference in the two versions.

Now, I normally recess about 11:30. I am going to recess now until 11:30. And the Government sit down with that statement of facts, the stipulated facts, and see what we can get stipulated to, because it seems to

me that 90 percent of it ought to be stipulated. Don't worry about what is relevant or irrelevant at this point, find out what facts you can stipulate to, and you can argue relevancy to me. But there isn't any sense in our taking testimony of things that there is no dispute about from your opening statement.

I am going to recess, and you go out and go over that set of facts, and by 11:30 let's get it together so we can move this along very quickly and have testimony on those points that cannot be stipulated to.

MR SZYBALA: Your Honor, I am sorry to interrupt. Could I clarify what it is that the Court is reviewing as stipulated facts? I should point out, I was local counsel throughout, and there was in fact a dispute as to the stipulated facts. I believe the defendants had submitted one version and the Government had submitted a counter version. We had agreed on a majority of this, but there was no final stipulation entered into by both parties.

THE COURT: Well, we are going to get a final stipulation.

[46] MR. SZYBALA: I recognize that, Your Honor.

THE COURT: That is what I am talking about.

MR. SZYBALA: I do recognize that.

THE COURT: But I don't know exactly which one I picked up, but it sounded like your opening statement this morning. And I don't know who presented it, it was labeled a stipulation of facts that I read through.

MR. LACOVARA: Your Honor—

THE COURT: I read through this whole file this morning. You all go out—I can't put my finger on what I read this morning, but you all go out and get me a stipulation of facts now here by 11:30. I am not going to listen to testimony on everything in here when the opening statements, everybody is saying the same thing and I have got no stipulation of facts.

Now, I am not going to sit and listen to all this evidence. Now, you all, somebody over here has got a copy

of what I read this morning, and it sounds like 90 percent of your opening statement. Now, you all go out and look at it. They will furnish you a copy. You go out and look at it and stipulate to it, and I will come back in here at 11:30 and I want a stipulation of facts.

NOTE: At this point a recess is taken; at the conclusion of which the case continues as follows:

[47] MR. CLARK: Your Honor, in the interim since we adjourned we have had an opportunity to, the Government counsel and counsel for the defendants have had an opportunity to review the stipulation. I am prepared to indicate to the Court now— First of all, let me emphasize the fact that there were no joint stipulations. And it was submitted to the Court as a joint stipulation of uncontested facts, but the Government hadn't signed it.

THE COURT: I understand that. But the rules require you to get together and present a set of stipulated facts.

MR. CLARK: But I wanted to underline that this was not a joint stipulation of facts.

THE COURT: I understand that.

MR. CLARK: The Government is prepared at this point in time to stipulate to all the numbered paragraphs on pages one through ten, that is numbered paragraphs one through 103, Your Honor.

THE COURT: One through 103?

MR. CLARK: That's correct, Your Honor. I will address for you the individual ones subsequent to 103.

THE COURT: Very well.

MR. CLARK: All right. 104, we don't contest that fact, we don't assert it. We think it is irrelevant, we have asserted that repeatedly in the summary judgment motion as well as the pleadings filed and the trial brief.

[48] THE COURT: As I indicated to you a moment ago, I want a stipulation of facts. You can argue to me what is relevant and what is not relevant. We don't

have a jury here, and I can disregard what I think is relevant. I am trying to get the facts together.

MR. CLARK: It is not a question of relevancy. It is a question really of the fundamental nature of the legal issue. And the arguments that we have taken, the position that we have taken is that Section 209 and common law right is not concerned with anything, even if the person is in the position to influence or to exert influence for his potential, I am sorry, for his prior employer, it makes no difference, it is not required. It is a conflict of interest statute that seeks to avoid being placed in that situation.

Therefore, we will not, we cannot stipulate to 104. We are not going to contest this. We are not going to assert, we are not going to offer evidence about 104, but we can't stipulate to 104.

Secondly, the Supreme Court recognized in *Mississippi Valley* about 104.

THE COURT: All right. But go ahead, you tell me what you are going to stipulate to after 103.

MR. CLARK: It is often impossible, very hard to discover if there is any kind of action that is done by an employee after—

[49] THE COURT: I understand that. Tell we what you agree to after 103.

MR. CLARK: I am sorry. 105, we take the same position.

THE COURT: Just tell me what you agree to.

MR. CLARK: Certainly, Your Honor. 106, 107, 108, 109, 110, 111, 112, 113, they are all agreed to.

114 asks us to look into the mind of Mr. Jones. We just can't do that.

THE COURT: I don't want to know what your objection is, I just want to know what you agree to.

MR. CLARK: The next one we agree to is 123.

THE COURT: All right.

MR. CLARK: 124. 125, Your Honor. Then 129, 130, 131, 132, 133, 134, 135, 139, 140, 141, Your Honor. 143, 147, 148, 149, 150, 151.

That concludes the list of the numbered paragraphs in the document labeled joint stipulation of uncontested facts.

THE COURT: Very well. All these facts are stipulated and agreed to. Get your witness back on the stand. You don't need to cover these areas which have been agreed and stipulated to.

MR. CLARK: Mr. Heyel, would you please resume the stand.

[50] BY MR. CLARK: (Continuing)

Q. Mr. Heyel, let me show you what has been marked as Government's Exhibit 42 and admitted as Government's Exhibit 42. Have you ever seen this document before, Mr. Heyel?

A. Yes.

Q. Can you tell the Court how you came to receive this document?

A. It was in response to our action item number 81-23 dated December 14, 1981, it is from Mr. Koester.

Q. I am sorry, what did you say?

A. It was sent by Mr. Koester.

Q. I am sorry, I didn't mean to cut you off. If I could direct your attention to the three attachments to Government's Exhibit 42. Were those provided by the Boeing Company and attached to the communication which is the first page of Government's Exhibit 42?

A. Yes, they were.

Q. I would like to have you take a look at what has been marked as Government's Exhibit 45. Have you ever seen that domument before?

A. Yes.

Q. Did you receive that document?

A. Yes.

Q. All right. Were the attachments one, two and three attached to the first page of Exhibit 45 attached to the [51] communication from Boeing that is a copy or was the original from which the copy of 45 was made?

A. Yes. These documents came from the Boeing Company.

Q. All right. Let me show you one final document, Mr. Heyel. That would be Government's Exhibit 53. I ask you the same question, have you seen that document before, Government's Exhibit 53, Mr. Heyel?

A. Yes.

Q. Can I direct your attention to the attachment to the exhibit. Was that attached to the document provided by Boeing?

A. This was part of our action item request. We did receive this document from the Boeing Company.

Q. So, the attachment to Government's Exhibit 53 is a form provided by Boeing to DCAA?

A. That's correct.

Q. Now, Mr. Heyel, did there come a point in time when DCAA transmitted a written report of its findings and conclusions to the principal administrative contracting officer?

A. Yes.

Q. Do you know when that, what date that report bore on the face?

A. 26 March 1982.

Q. Based upon your experience, are you aware of any instances in which a report such as that report that would reach the administrative contracting officer any time prior to [52] the date that appears on the face of the document?

A. No. Occasionally the report will arrive at the contracting officer's a day or two late depending upon the mail.

Q. Now, did Boeing include the payments that it made to the individual defendants in its overhead calculation?

A. Yes.

Q. Okay. And did they include the full amount of the payments in their overhead calculations?

A. Yes.

Q. And did there come a point when they withdrew, that is Boeing withdrew these charges against overhead?

A. Boeing withdrew the charges in August 1986.

Q. Did the action have withdrawing the charges or claims against the overhead mean that the government had suffered no expense or cost as a result of these payments having been made to the individual defendants?

A. Well, Boeing's accounting/billing system at that time was such that once a cost was recorded, that was automatically included in billings to government contracts. So, government contracts paid a portion of that cost for a point in time. Once we found costs were incurred, we ultimately adjusted the withhold rate and reduced those costs from the billings. But, the point in fact is that Boeing had the use of the government's money for about a two year period.

Q. Would the use of the government's money for that two [53] year period constitute a form of loss or expense to the government?

A. Yes, I believe so.

Q. Did DCAA undertake to compute and ascertain the amount of the interest or the expense that resulted to the government because of the period of time that Boeing had the use of that money?

A. Yes, we did.

Q. Can you explain to the Court briefly how you undertook that computation.

A. Yes. At that time the Boeing Aerospace Company billed on a cumulated recorded cost basis less a withhold rate developed by the administrative contracting officer. Once the costs were reported, they were automatically included in government billings. So, we measured the time between the time the costs were recorded until the time the government found, identified those costs and included those amounts in the withhold rate.

Okay. Then we applied the U.S. Treasury rate. Because those costs were included in the general and administrative expense pool, they were allocated to all work,

including commercial work. So, we identified a portion of the payments that went to commercial work and excluded that from our calculation. In other words, we developed a government participation percentage and applied that to the interest [54] calculation.

Q. Did you reach a conclusion as to the ultimate figure as to the amount of interest or expense the government bore as a result of Boeing having the use of that money?

A. Yes. We did an initial calculation and came up with an amount of 46,306.

Q. Did you perform any other computations?

A. Yes. We relied on the administrative contracting officer to provide us the date on which the withhold payments, I am sorry, the severance payments were included in the withhold calculation. Upon further review we found that that date was incorrect. So, we revised the date of the withhold calculation, in other words, when the government got its money back, and went through a very similar calculation.

We did make one additional, two additional adjustments. We increased our sample size in computing the government participation. Boeing Company has hundreds of contracts, and therefore we used a sample method in determining the amount of government contracts that were involved.

In addition, Boeing submits its billings based upon public voucher and progress billings. Public vouchers, they receive 100 percent reimbursement less the withhold rate. However, progress payments there is an additional withhold amount. So, we did an additional adjustment to consider the withhold amount on those kinds of contracts.

[55] Q. Was there any other alterations you made in your methodology.

A. No, the methodology was the same.

Q. What result did you reach as to the final figure based upon those computations?

A. I believe it is 74,309.

Q. And that amount represents your computation as to the amount of expense or interest the government lost as a result of the money being charged by Boeing against the government?

A. That's correct.

MR. CLARK: That's all the questions I have at this point, Your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. SHARP:

Q. Mr. Heyel, I have just a few brief questions. Is it correct, sir, that the information contained in the March 26, 1982 audit report was known by you sometime prior to that date?

A. We were in the process of doing a review, and which involves various audit steps, and some of the information—Well—

Q. I don't mean to interrupt you. But you had received communications from Mr. Koester of Boeing on two separate occasions prior to March 26?

[56] A. That's correct.

Q. And you had had people at the Defense Contract Audit Agency speak to a number of people at Boeing, interview them?

A. That's correct.

Q. Prior to that date. That information was in your hands prior to March 26?

A. The information, the action item that I just gave testimony on, yes, we had information prior to that date.

Q. That information was also in the hands of Mr. Freimuth at that time, the resident auditor?

A. We transmitted that information to Mr. Freimuth at various points in time.

Q. Do you know—

A. Excuse me. Obviously they were received before the report date, because he needed that information to write his audit report.

Q. Mr. Heyel, is it not correct that there is a defense acquisition regulation which explicitly covers severance payments made by defense contractors that was in effect in 1982, 1981?

A. There is a regulation, yes, on termination payments.

Q. You may not agree that it applied here, but it is true that Mr. Koester referenced that specific defense acquisition regulation in his responses to DCAA?

A. I believe he did, yes.

[57] Q. Mr. Heyel, isn't it true that the ultimate determination of disallowable costs by the government in overhead claims is made at the close or the settlement of that claim?

A. Yes.

Q. Have the overhead claims for the Boeing Aerospace Company for the years 1981 and '82 been finally closed or finally settled to date?

A. No.

Q. Isn't it correct, Mr. Heyel, that the government sets unilaterally a withhold rate for a given year to be withheld as a percentage of the total overhead costs incurred by a defense contractor, and that withholding would be deducted from periodic payments or progress payments made to the contractor?

A. Yes.

Q. Is it accurate to describe that withholding as a percentage of the total overhead costs which the government projects it will ultimately disallow?

A. The calculation includes various specific elements of costs based on information that it has at the time it sets the withhold rate.

Q. It is simply a percentage figure that is set, is that not correct?

A. No. Well, it is a percentage figure, but it is comprised of various components. Okay. It is a very detailed [58] calculation. Okay. And we go through all the information we have at that point in time and develop it, and the withhold rate is developed on that basis. So, ultimately it is reduced to a percentage figure, but there are very specific components to that withhold rate.

Q. Isn't that done, Mr. Heyel, to protect the government or to assure that the government pays no portion of potentially disallowable costs?

A. Yes.

Q. You testified you have been either resident auditor or branch manager of the Puget Sound branch dealing with Boeing for how many years?

A. I was branch manager to August 1983, and I am currently the resident auditor. So, it is a little over six years.

Q. Mr. Heyel, for any Boeing Aerospace overhead claim with which you have been involved, has the application of the withhold rate resulted in underwithholding? Meaning at the end of the settlement that Boeing owed the government money? For any year that you are involved with?

A. Let me kind of address that.

Q. I would appreciate just a yes or no answer. Has this withhold rate ever resulted in underwithholding?

THE COURT: He can answer and then he can explain his answer.

[59] A. Yes, it has. What I want to explain is that the withhold rate tends to float. Okay. It is based on information known at that point in time. For example, in August 1983 the withhold rate for 1981 was about 1.11 percent. For '82 it was 1.57 percent. In 1986 the withhold rate for those years was 2.11 percent.

So, when you say we did not, we underwithheld or overwithheld, okay, you have to go back and look at the

withhold rate at that point in time rather than than the withhold rate at the time of the final settlement.

Q. The withhold—

A. In other words, the withhold rate is a dynamic function of information known at the time that it is done, and it changes. It is not a static figure.

Q. I will ask you again. At the settlement of any Boeing Aerospace claim did it ultimately turn out that there was underwithholding so that Boeing owed the government money at the settlement time?

A. Well, to answer the question, you would have to give a point in time reference as to what you are comparing it with. Okay. So, if you compare it with the withhold rate at the time that the final settlement, I would say that—

Q. I am comparing it to the withhold rate that was applicable during the year that the costs were incurred, for the year, however it may have been adjusted, for 1981, 1982?

[60] A. But at what point in time? In 1986 we have more information and the withhold rates were increased because of that information, and then to compare that with the final settlement, I would say that the answer to your question, that the government, the withhold rate is probably not underwithheld.

Q. Let me just ask you one question.

A. Yes.

Q. If at the conclusion or the settlements on overhead claim it is determined at that time that there was overwithholding, meaning that more amounts were withheld on periodic payments than were ultimately determined to be disallowable costs, does the government pay any cost of money or interest to the contractor?

A. No.

MR. SHARP: I have no further questions.

MR. LACOVARA: No questions, Your Honor.

MR. TREANOR: No questions, Your Honor.

THE COURT: Thank you, you may step down.

NOTE: The witness stood down.

THE COURT: Who is your next witness?

MR. CLARK: The Government calls Secretary Paisley, Your Honor.

NOTE: The Defendant Paisley is sworn.

[61] THE WITNESS: Your Honor, I wonder if before questioning starts, if it would be in order for me to ask a question, a simple one. After the confusion, I am not sure what I am defending myself against, I don't know what the charge is. What is it that I am being charged? I have lost track of it.

THE COURT: I would say that the question is inappropriate. You listen to the questions and respond to them.

THE WITNESS: Okay.

MELVYN R. PAISLEY, a witness called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. CLARK:

Q. Mr. Paisley, am I correct that you are currently Assistant Secretary of the Navy for research and engineering?

A. That's correct.

Q. And when did you assume that position, Mr. Paisley?

A. I think it was December 2, 1981.

Q. Who had been your prior employer?

A. Boeing.

Q. And how long—

A. That was, I was unemployed for about two months. My previous employer was Boeing.

[62] Q. When did you leave the Boeing Company?

A. I retired on I think it was the 1st of October of that same year.

Q. And during the subsequent time frame did you occupy any position before you assumed your position as Assistant Secretary of the Navy for research and engineering?

A. Between October and December? Is that the time period you are talking about?

Q. From when you left Boeing until you assumed your position?

A. I was a consultant for the government.

Q. Could you explain to the Court how you were a consultant. In other words, for whom were you a consultant?

A. I was a consultant for the Secretary of the Navy on research and development issues.

Q. Is that Mr. Lehman?

A. Yes.

Q. Had you known Mr. Lehman before you assumed the position as consultant or as Assistant Secretary?

A. Yes, I did.

Q. How long had you known Mr. Lehman?

A. I think about two years before I went in government.

Q. Could you explain to the Court, Mr. Paisley, how you became aware that you were being considered for your current position?

[63] A. Well, I went in to see Secretary Lehman about another issue, and Jed Gordon, he was a commander at the time, said to me, I understand you are here to talk about a position. I said, I don't think so, I have got some business here. He said, no, I think the Secretary wants to talk to you about applying for a position. I went into his office and he told me that's what he wanted me to do. So, that's how I became aware of it.

Q. So, it is your testimony that Mr. Lehman requested that you consider placing yourself under consideration?

A. That's correct.

Q. I would like to show the witness what has been marked as Government's Exhibit 72, Your Honor. I

would like you to read that document, Mr. Paisley. Let me know when you have had a chance to complete your reading. Have you ever seen that document before?

A. Just let me read it for a moment.

Q. Certainly.

A. That's right

Q. Are you the author of this document?

A. That's correct.

Q. Is that your handwriting at the bottom?

A. Right.

Q. Can you read to the Court what the handwriting says?

A. It said, did this approximately May 20, T said I should do it.

[64] Q. What is that handwritten statement in reference to?

A. I had written him this note, and I had had a conversation with him about the note after I sent it to him. And I asked him if he thought I should go into the government. And he said he thought I should.

Q. Could you identify for the Court who T is that is referenced in this letter?

A. At the time he was the chairman of the board of Boeing, and I am not sure what he is doing these days.

Q. What was his full name at that point?

A. I think it is Thornton Wilson.

Q. Did you understand that—I see that you used the term process by name. Did you understand that there might be a period of time it would take before it would be determined that you would definitely be offered the position as Assistant Secretary?

A. Yes, I did. Going into the government has a lot of ups and downs, and I knew it might be some time.

Q. In fact, your position required Senate confirmation, did it not?

A. Yes, it did.

Q. Mr. Paisley, did you have any discussion with anyone at Boeing about payments you might receive

should you leave Boeing to go to work for the federal government?

A. Yes, I did.

[65] Q. Do you remember when those conversations took place?

A. I think they were probably between May, June, July, that time frame in '81.

Q. Of 1981?

A. Right.

Q. With whom did you have those conversations, Mr. Paisley?

A. Most of them were with people in industrial relations within the company. I might tell you that I was asked this question during the deposition. I couldn't remember all of it, all the people I had talked to. Since then I have looked at some of these records they gave me and I am reminded of a few of the people.

Q. Could you identify those people for the Court?

A. Well, there was Stan Little, I didn't recall that I talked to him, but after I read that I recalled it. Yes, I talked with Stan Little.

Q. What was Mr. Little's position?

A. I think at the time he was the head of industrial relations for the corporation.

Q. Do you recollect anybody else you talked to?

A. I talked to the head of industrial relations for the division that I was in, and I think his name was Hagberg.

Q. Would that be Boeing Aircraft Corporation?

A. It was the Boeing Aerospace Company.

[66] Q. Aerospace Company. Do you recollect any other individuals you talked to prior to leaving Boeing?

A. I talked to them, and they were in industrial relations, almost all of them.

Q. Can you explain to the Court, when you use the term industrial relations, what did that department do?

A. Well, up until I started talking to you guys I used to call it personnel, and you said is that the same as in-

dustrial relations. It is personnel. I never used to use that term myself. Personnel people.

Q. Do you recollect what was the nature of these conversations, what you said to these individuals, what they said to you?

A. I think most of the conversations were associated with when I might be leaving, did I think in fact I was going into the job. My opinion on that seemed to vary from week to week because of the nature of the problem going in.

There was a point in time when somebody told me that they were going to give me severance pay in the order of $180,000. I can't remember who it was. I think it was Little.

Q. Prior to the time that you left Boeing's employ, Mr. Paisley, did you submit any kind of document to Boeing that related to anticipated or possible payments you might receive from Boeing?

A. Early in this process, I am not sure where, sometime [67] in this May, June, July time frame, T.K. Jones, one of the defendants here, told me that he was thinking about going into government and that he had prepared a document talking about what the financial impact was going to be. I showed it to my wife, and she prepared a similar document for me. And the corporation through some means found out I had it, and asked me for it and I gave it to them.

Q. So, if I understand your testimony, you are saying that you got a copy of the document that Mr. Jones told you that he had submitted to Boeing?

A. I am not sure, I will be very frank with you, I am not sure if I got the document or only looked at it. My wife reminded me that we definitely had seen it. I don't know that I got it or not. I am not sure I got it. I don't have a copy now.

MR. CLARK: Your Honor, I would like to show the witness what has been designated as Government's Exhibit 111, pages 184 to 200. This is also the same exhibit,

Your Honor, as Government's Exhibit 70. I am simply using this copy because the reproduction is clearer and I wanted to ask Mr. Paisley some questions about it. I would also like to show Secretary Paisley what has been designated as Government's Exhibit 70.

A. Is this the same one? Let me see. It is not identical, is that what you are asking me?

[68] Q. Where is there a difference?

A. Well, I just quickly, there is a page in the back, a couple pages attached to this one, I don't think it is relevant, but there is two pages on the back of this one that are not on this one.

Q. Which one are you making reference to, Mr. Paisley?

A. The Exhibit 70 has a couple pages on the back of it that this one doesn't.

Q. They are at the back of the exhibit?

A. Yeah. This sheet and this sheet right here.

Q. Are you making reference to the stock market quotations?

A. Yes. I would like to say, I am not sure—If you—You asked me if they were the same. They do not appear to be exactly the same. The balance appears to be exactly the same.

Q. Except for the two documents stuck on the end, they appear to be the same document, is that correct?

A. Yeah.

Q. Let's use the one that has the 716 at the bottom or the 100184 with the strip across the bottom.

A. This one?

Q. Yes.

A. Okay.

Q. Can you identify that document for the Court?

A. This is a copy of the document that my wife prepared.

[69] Q. Did you review the document? Excuse me, let me go back. Was this document submitted to Boeing?

A. They asked for it, and I gave it to them.

Q. Was this submitted to Boeing prior to you leaving Boeing?

A. Yes, absolutely.

Q. Was it submitted prior to your receipt of any payments from Boeing?

A. Yes.

Q. Did you review this document before it was admitted to Boeing?

A. I am sure I did.

Q. If I can direct your attention to the second page, that which has 100185 at the bottom?

A. Right.

Q. All right. Do you see up at the top, there is a handwritten insertion opposite number 23?

A. Yes.

Q. Did you write that?

A. Yes.

Q. Thank you.

A. By the way, can you tell me what it says?

Q. I was just going to ask you if you could read it for the Court.

A. Yes. If I retire now.

[70] Q. Thank you. Let's go back to the first page of the exhibit. What was the purpose of submitting this document to Boeing?

A. They asked for it.

Q. What did you seek to convey by submitting this document?

A. I didn't seek to convey anything. They asked for it. I put this together for myself, my wife did, to show the financial impact if I left Boeing under the conditions we were talking about and went into the government.

Q. Now, when you use the term financial impact, what do you mean by that?

A. Well, I was going to— I have one source of income, certain fringe considerations, so forth. And there is a possibility I am going to leave the Boeing Company,

go to work for the government, and what would be the impact on my financial situation if I did that.

Q. All right. If you left Boeing and went to work for the government?

A. Right.

Q. Now, can you explain why on the first page at the top here, opposite Boeing, you have got first year, second year, third year, fourth year?

A. Well, the analysis was made based upon a four year time frame. And when I started thinking about this, I guess we [71] were just thinking about I guess it is four years you go into the government for, as long as the administration is in. I am not quite sure, but it was for a four year period. That's what that is.

Q. All right. Under the first part of the first half or the top half of the first page of Exhibit 111, 100184, I see that there is an indication there, number one, wages, is that correct?

A. Right.

Q. And opposite it way over to the right there is a figure 352,000, I think it is 872 or 372?

A. Yeah.

Q. What is that number supposed to represent?

A. It represents what I thought might be a difference in salary if I left Boeing and went to work for the government, and that would be the financial impact that I had to take into account.

Q. Does each of the numbers under the first year, second year, third year, fourth year, in the column opposite number one, wages, is that an estimate of what you thought you would receive as salary from Boeing if you remained at Boeing for the next one, two, or three or four years?

A. Yes. That's probably what it is, sure. That's what it looks like. That's the salary growth, yeah.

Q. All right. Can I direct your attention now down to [72] still under the designation Boeing, number ten and 11. Do you see those, Mr. Paisley?

A. Yes.

Q. What does that say after ten?

A. VIP company contribution, it is abbreviated. And it is says under 11, it is FSP company contribution.

Q. Can you explain to the Court what the numbers that appear under the first year, second year, third year and fourth year for the VIP and the FSP are meant to represent?

A. Yeah, We had a plan at Boeing where you could make a contribution of salary. I think it was 8 percent or something of your own salary. The company would then put in, match it by 50 percent, like 4 percent. That was the maximum that you could do. I believe what this it is the amount of money that the company would contribute, the 4 percent over those periods.

Q. So, if I am correct, you are testifying that the numbers here represent your estimate as to what the company would have contributed had you remained a Boeing employee for the first year, second year, third year or fourth year?

A. Yes, sir, that's correct. I am pretty sure that's what that is.

Q. Is that also true of the FSP calculation?

A. No. It is a similar thing. I think—It is a financial plan, and right now I can't recall. It is a similar type of thing, but it wasn't an 8 percent/4 percent. I can't [73] recall what that is. It is similar. I couldn't tell you for sure. Somebody here could, by the way.

Q. Am I correct that that represents, those numbers there represent your estimate as to what the company, that is Boeing, would have contributed to your FSP account had you remained an employee of Boeing for one, two, three or four years in the future?

A. Yeah, I believe that is correct.

Q. Now, at the bottom there over to the right we have a number that appears to be $573,005. Do you see that, Mr. Paisley?

A. Right.

Q. What is that number meant to represent?

A. That represents the total, what I considered I think to be income over those four years if I stayed at Boeing.

Q. So that figure, if I am correct, represents what you estimated that had you stayed at Boeing for the period of four years, you would have realized that much in compensation benefits?

A. Right.

Q. Now, if I can direct your attention now to the rest of the first page of the exhibit, the part that says government.

A. Right.

Q. Can you explain to the Court what the data opposite line 12, wages, is meant to convey?

[74] A. That was the salary we assumed that I would be getting in the government.

Q. Do you recollect how you used that particular figure for your salary?

A. Yes. I think I must have got it from some publication. These things are published. That must have been what we thought the job was going to pay, and that it might go up with time. And it seemed to be fairly accurate as I look at it now.

So, that was my salary that I would receive in the government.

Q. So, am I correct that that figure, 227,966, represents the salary you thought you would probably get if you went to the government and stayed for a period of four years?

A. That's correct.

Q. Now, I see a number of zeros opposite columns 13 through 20. Can you tell the Court what that means?

A. Yes. The assumption here was from the way we understood it, those things were not available in the government. Similar things that we had in the company were not available. For instance, dental benefits, the government doesn't give you dental benefits. Or vision care, life insurance, and so forth.

Q. So, am I correct that the zeros there are used to indicate that you did not anticipate any form of government compensation for those particular items?

[75] A. That's correct.

Q. Near the bottom of the first page of the Exhibit 111, 100184, there is a number opposite total salary and benefits, parentheses government, and it appears to be 227,966. Do you see that, Mr. Paisley?

A. Yes, I do.

Q. Can you explain to the Court what that figure is supposed to represent?

A. 227?

Q. Yes.

A. That's the total of these four years. It is a carry down of the number above it, which is total salary while in the government that I anticipated.

Q. So, am I correct that that figure represents what you anticipated would be your total government compensation should you accept the government position for a length of four years?

A. Correct.

Q. The final figure there, at the bottom, 345,039, the first page of the exhibit, opposite difference between Boeing and government. Can you explain to the Court what the significance of that is?

A. That's the difference in the two numbers.

Q. Am I correct that that number represents a subtraction of your anticipated government salary and benefits from what salary and benefits you thought you would earn at Boeing had [76] you stayed for a four year period?

A. That's correct.

Q. All right. Mr. Paisley, up at the top of the first page of the exhibit, as I read it, it says, and please make sure that I am reading it correctly, compensation related costs, Boeing?

A. You are on the second page?

Q. No, I am on the first page.

A. I am sorry.

Q. At the very top of the first page.

A. Compensation related costs, Boeing versus government. Right.

Q. And there is an asterisk there. Can you explain to the Court what the asterisk is supposed to convey?

A. No, I can't. Down at the bottom, let's see, it says something on the bottom here. Let me see if that refreshes my memory. See attached for notes corresponding to numbered items. I must have had some notes. That must be what it is related to. Yeah. Back here later are—Let me see if it tracks, just to be sure that I am not giving you the wrong dope here. Showed how these numbers were calculated. My wife is pretty good at this. Yeah, that is what it is.

Q. All right.

A. That asterisk explains in a little more detail each one of these numbered items and sheets that follow.

[77] Q. So, for example, if we look at the second page of the exhibit, opposite number 26, cost of living—

A. Cost of living.

Q. And if we thumb back in the exhibit to find numbered paragraph—

A. 26.

Q. That paragraph will relate to that figure that appears after number 26?

A. Yeah, that's exactly what it is.

Q. Let's go to the second page of the exhibit.

A. Okay.

Q. Cost of living, number 26. Do you recollect what that was meant to represent?

A. The difference in the cost of living between Seattle and Washington, D.C., is what I think I used.

Q. How about number 29?

A. Nonreimbursed moving costs. That if I moved to Washington, it was going to cost me $15,000 to move, and I wasn't going to be reimbursed for it. It turned out it cost me 25, by the way. That's what it was.

Q. How about number 34?

A. State tax, increased state tax. That was for, I think I used Virginia state tax, it turned out, that's where I do live too. There was not a state tax, sales tax, that probably was—No, that is income tax. The State of Washington didn't [78] have a state income tax, and that's probably the lost of state income tax in the State of Virginia.

Q. All right. Let's look to page 7 of the exhibit, which is designated for the record as Government's Exhibit 111, page 100190.

A. Okay.

Q. Have you found that, Mr. Paisley?

A. Right.

Q. Does that number ten relate to the number ten that appears in the first page of the exhibit?

A. Yeah, that's that VIP.

Q. Let me ask you the same question about number 11, which is on the next page of the exhibit, Government's Exhibit 111, 100191?

A. That's the item I couldn't think of before. FSP, that's called a financial security plan. They would take your, I think it was vacation, and they would contribute, if you didn't take the vacation, I think they put it in a fund for you. I think that's what it was. And that's what that 11 is. I think that's what it was. It is not completely explained here, so it doesn't jog me completely. I think that's what it was.

Q. Does that computation there or the data that appears there after 11 on page 191 of the exhibit, does that assume that you would have stayed, is that the figure that you would have realized had you stayed at the Boeing Company?

[79] A. That's correct.

Q. And the same thing is for ten on the previous page?

A. Yeah.

Q. Let me direct your attention, Mr. Paisley, to page 193 of the exhibit which has a little 10 at the bottom.

And I specifically would like to direct your attention to numbered paragraph 26.

A. Okay.

Q. What was information meant to convey?

A. That is the cost of living difference between Seattle and Washington, D.C.

Q. If I direct your attention to the next page and number 29, is that what you testified previously about the moving costs?

A. That's correct.

Q. So, you assumed, am I correct, that you would not be reimbursed for your moving costs?

A. That's correct.

Q. And let me direct finally your attention to page 100196 of U.S. 111, which has a little 13 at the bottom, and number 34. Can you explain to the Court what that is supposed to represent?

A. Yeah, that's the difference in state income tax I think I mentioned before between the State of Washington and Washington, D.C.

M.R. PAISLEY—DIRECT EXAMINATION

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[80] Am I correct that—

A. Actually I think it must have been Virginia. I am not sure it was Washington, D.C. Does Washington, D.C. have an income tax?

Q. I am a resident of Virginia, I don't know.

A. It must have been Virginia.

Q. In reference to the numbered paragraph 34, am I correct that that is supposed to convey that there would be no difference in the sales taxes between Washington State and the District of Columbia or Virginia?

A. No. That says that there is a difference. Oh, wait, sales tax, you are correct. I just assumed that the sales tax would be the same.

Q. But that there would be a difference in the income tax rate?

A. That's right.

Q. Mr. Paisley, is there any place in this document, U.S. Exhibit 111, 100184, in which you provide data to the Boeing Company as to the contributions you felt you had made as a Boeing employee? By contributions I don't mean financial contributions, but the services—

A. In this document?

Q. Yes.

A. That wouldn't be in this document. This document was prepared for myself. I prepared this so I could look at it and [81] make a decision, and Boeing asked for it. I wasn't trying to convey something to Boeing when I prepared this.

Q. It was submitted to Boeing, however?

A. They asked me for it.

Q. Did you submit any other documents to Boeing that sought to assess your past contributions as an employee to Boeing?

A. I doubt it. I always thought it was self-evident. I am sure I didn't do that. My father told me that self-praise is no praise at all.

Q. Was there a point in time when you became aware of the practice that Boeing had of making payments to Boeing employees who left Boeing to go to work for the federal government?

A. Yes. Did you say was I aware of it?

Q. Yes.

A. I guess I became aware of it as almost a fact when a friend of mine came into the government, his name was Ben Plimal.

Q. He went into the federal government?

A. He went into the federal government, the Department of Defense.

Q. Did you discuss with him the fact that he received a payment?

A. Yes.

Q. Do you recollect when approximately this was?

[82] A. It was in the '70s.

Q. Did you receive, in addition to your severance payment, any other payments from Boeing when you left

to initially retire and then go to work as Assistant Secretary of the Navy?

A. Well, these plans that we talked about, the VIP plan and the FSP plan, I had one to withdraw from the company. So, there was a check for that, probably included in it was probably my financial paycheck and that sort of thing.

Q. How many checks did you receive when you left?

A. I think I received two.

Q. So, am I correct that when you submitted at Boeing's request the Government Exhibit 111, 100184, you had had these conversations with this individual and you were aware that Boeing had a practice of making payments to individuals who left to go to work for the federal government?

A. The one I made reference to, Ben Plimal?

Q. Yes.

A. Yes. That was in previous years. I was well aware of that conversation that I had with him. I was aware that he got severance pay, at least he told me he did, years before this.

Q. And I believe you said you had talked to Mr. Jones about it as well, is that correct?

A. No. I talked to Mr. Jones about the fact that he thought he was going to get one. I don't think he knew he was going to get one when I talked to him. I am not sure if he [83] ever told me he knew he was going to get one.

MR. CLARK: If I may have just a moment, Your Honor.

Q. Secretary Paisley, do you remember how much you got paid from Boeing for your severance payment termination?

A. It was 183. I always talked about it as 180, but I think the exact number is 183.

MR. CLARK: That's all the questions I have of Mr. Paisley at this point.

THE COURT: Cross-examine.

MR. BENNETT: Just one question.

CROSS-EXAMINATION

BY MR. BENNETT:

Q. Mr. Paisley, looking at the exhibit the Government referred you to, page number 100185. Am I correct that this document which was submitted to Boeing, you indicated that you felt the total loss to you of accepting government employment was approximately $825,000?

A. It was, I recall, and I don't just quickly see it, that's what I thought my loss was. I think I also put in a sheet showing what my wife's loss was.

Q. Boeing paid you a small portion of that, is that correct?

A. Yes.

MR. BENNETT: Nothing else, Your Honor.

[84] MR. LACOVARA: Your Honor, of course we would have intended to call Mr. Paisley as a defense witness. In order to save the Court time, I will examine him now, unless the Court would prefer that we complete the Government's case.

THE COURT: Do you have any objection to doing that?

MR CLARK: No, if that's what the Court wishes to do.

THE COURT: Very well.

BY MR. LACOVARA:

Q. Good morning, Mr. Paisley.

A. Good morning.

Q. At the beginning of your examination by Government counsel you were asked whether you had some position with the Department of Defense before you were confirmed and appointed as Assistant Secretary of the Navy. Would you remind us what that position was.

A. I was a consultant for the Department of the Navy to John Lehman up to the time I went into the government as a government employee. I was not an em-

ployee, I was a consultant. There is a definite distinction between the two.

Q. Do you understand that to be a category called special government employee or consultant?

A. Yes, that's right.

Q. And that was before your confirmation?

A. That's correct.

[85] Q. When were you confirmed by the Senate?

A. December 2 in '81.

Q. Do you recall when your nomination was actually sent to the Senate?

A. No, I don't. It is always hard to tell in the process. It had to be a month before that. It may have even been longer than that.

Q. Using the date for your retirement, October 1, 1981, do you know, did you know whether or not the President was Boeing to appoint you to this position before or after you retired from Boeing?

A. I think it was after.

Q. So, you retired from Boeing before you learned of your proposed appointment by the President?

A. Yes.

Q. You talked a little about a financial impact statement, Mr. Paisley, and mentioned that it was prepared by your wife Vicki. Why did your wife prepare that statement?

A. She has a little more sense in these matters than I do. She did financial work before she came to work for Boeing. She actually worked for Boeing too. She was in Boeing's Computer Systems Corporation, it was a subsidiary at the time. And so, she understood this stuff better than I did. And so, that's the reason she prepared it.

Q. Is the document that was shown to you as Government's [86] Exhibit 70, or in another copy, a portion of Government's Exhibit 111, in her hand rather than your handwriting?

A. Yes, it is.

Q. And you said she did financial analysis for Boeing?

A. Yes.

Q. She was a Boeing employee at the time?

A. She was a Boeing employee at the time.

Q. Could you summarize for us, sir, what your understanding was in 1981 of Boeing's practice regarding severance payments?

A. It was fairly vague, but the practice as I understood it is that when you went into government service, and I thought it was city, state, federal, I didn't think it was restricted to federal government, that Boeing gave you a severance pay because you had to sever your relationship with the company. And that's almost all I knew about it. I really didn't know much more about that. It was pretty vague.

Q. Did anyone ever indicate to you from the Boeing Company that severance payments were made in order to compensate people for rendering service to the United States Government?

A. I don't think it was ever put in those terms. I don't recall that ever being put in those terms.

Q. You have testified earlier that Secretary Lehman asked you to consider becoming Assistant Secretary of the Navy. What [87] was your attitude when he issued that invitation?

A. When he first asked me, I said, I am not going to do this, I am not going to leave sunny Washington and come back to all this snow. And it turned out that I was totally wrong, it is really nice here. But I went home and a couple three days later called him up and said, I think I am ready to come help you.

So, it took me a couple three days to think about it and I said, I will apply for the job. And that's kind of the sum of it.

Q. Did you discuss with your wife whether you should apply for the job?

A. Yes, I did.

Q. And how did you come to ask her to prepare that document that has been referred to as Government's Exhibit 70 or a portion of Government's Exhibit 111?

A. I think probably that in talking to T.K. Jones I found out what he was doing, and I just said to her, that might be a good idea to do that, figure out what it is going to cost me if I leave Boeing and go to work for the government, we ought to know what the financial impact is. I think that's probably how it started.

Q. Were you considering using that information to decide whether actually to follow up on Secretary Lehman's invitation?

A. I am not sure. I am not sure if I was trying to [88] decide should I do this or not. I suspect that if this would have turned out five times higher than it was, I would have done the same thing anyhow. So, I can't think it was a real driver. I think it was just try to understand— After all, it might turn out that I couldn't do it. You know, it is possible that this sort of arrangement, you look at it and say that I am going to have to sell my house or something if I am going to go do this. So, I did it to find out what the financial impact was. So, I couldn't honestly say that.

Q. Okay. When did you first learn, Mr. Secretary, that you would be receiving a severance payment from Boeing?

A. I really don't know. I think I used to think it was in late summer. Having looked at all this stuff, it reminded me that it was probably more in the middle of summer of '81.

Q. Returning to the document that is so much in question here this morning, did you tell your wife what factors to include in that document?

A. I can't recall that I told her any one factor at all to put into it. I think that she got the basis for it from what T.K. did, and the balance of it she put in based upon her own experience. I wouldn't know of, half the

stuff I wouldn't have put in, I just didn't understand the problem that much.

Q. I would like you to pick up Government's Exhibit 111, if you would. And you spent a considerable amount of time talking with counsel for the Department of Justice this morning [89] about some of these items. I just would like to direct your attention on page 2 of that exhibit to the items that are listed at least in paragraphs 21 through 25. And I ask you to tell the Court whether in your view at the time, at least as you understood what your wife had prepared there, those reflected what you thought you would lose by resigning from Boeing, that it related to the prior periods of service that you had already given to Boeing?

A. Yes. In fact, that's what they all are.

Q. Would you explain how these related to the time you had already worked for Boeing and what you would be losing in terms of past service.

A. Well, the first one is unexercisable stock options. There was a Boeing rule that you couldn't exercise stock that you had received in the previous year, or something like that. And so, I was going— I would have to turn that stock back in if you go to work for the federal government, for DOD at least.

There were also some unexercisable options because the option price was higher than the stock price, so what you normally do with that stuff is keep it and eventually some day it looks good, you exercise it when you know you will make a profit on it. Prematurely retiring from the company, it wasn't a straightline loss in terms of retirement. Early retirement, you paid a loss for retiring.

Q. So, by retiring from Boeing in 1981 in order to accept [90] a position with the United States, the value of the time you had already accrued at Boeing was diminished?

A. That's right, because I wasn't straightlined. And then the item I mentioned previously, the loss on the VIP

program. If you terminate that VIP program prematurely, you paid a loss for the portion Boeing had in. You didn't get the full amount out. And that was my estimation of my wife's of what that amount would be. Sick leave, I accrued a lot of sick leave, and just had to, you lost the sick leave. It was just sick leave I had accumulated over my service in the company and lost it.

So, that's the items. That's essentially those.

Q. By the way, by whom were you employed on the date that you prepared this Exhibit 111?

A. This?

Q. Yes.

A. I was working for Boeing.

Q. You had not been appointed to the United States position?

A. No.

Q. May I direct your attention to page 3 of that document. The last line reads total loss, Vicki. Who was Vicki?

A. Vicki was my wife.

Q. And could you explain why this document included calculations regarding your wife?

[91] A. She was an employee of Boeing. And the legal counsel for the Navy advised me that it would, might be a conflict of interest if she worked for Boeing after I came to the government. So, she knew that rule, she was aware of that rule. And so, she just figured what would be the cost if she had to terminate. And this is the cost of her terminating.

Q. Did she in fact terminate in order to accept the advice of the Navy legal counsel?

A. Right, yeah.

Q. Mr. Paisley, the losses that are outlined on page 2 and perhaps on page 3, would it be fair to say that those were losses that you were going to suffer regardless of what purpose you retired for or what job, if any, you might take after retiring from Boeing at that stage of your career?

A. If I would prematurely retire, as I did, this was the loss I saw. The way you would accumulate this would vary on the kind of job you might be going into in terms of what that salary would be and so forth. But that's what I saw as a loss. It turned out the number was low.

Q. I am sorry?

A. I turns out the number was low, but that's what I thought it would be.

Q. Did you expect Boeing to make a severance payment to you that reflected the total figure that you calculated would be the financial impact on you of leaving Boeing; that is, [92] approximately $825,000?

A. I didn't put this together to say to Boeing, you ought to give me 840,000 severance pay. I put this together to find out what the financial impact of taking this position was. And so, I didn't know what Boeing was going to do. And, granted, giving it to them, I am sure I thought that might influence what they would think, because this was just my analysis or my wife's analysis. But I didn't put it together for that reason.

Q. Do you recall the date on which you were actually paid a severance payment by Boeing?

A. I think it was the date I retired, and I think it was on the 31st of September when I got all my checks from Boeing when I left.

Q. The 30th of September—

A. 31st of September.

Q. 30 days hath September?

A. I will be damned if I didn't think it was the 31st. It was the day before October 1.

Q. Yes, sir.

A. Right.

Q. And I believe you just said that you were still employed by Boeing at the time?

A. Yes.

Q. And we have already established the dates on which you were later appointed Assistant Secretary of the Navy?

[93] A. Yes.

Q. Was the amount of the check that you received reflecting severance $183,000 or some smaller amount?

A. Well, they took— It was treated as salary, and so consequently they took out withholding from it. So, I don't know the exact amount. It was 183 less withholding tax on it because it was salary.

Q. Either at the time that you were told you would be offered a severance payment of approximately $180,000 or the time that you were given that payment on or about the 30th of September, 1981, did anyone at Boeing tell you how that payment was calculated?

A. No. I don't know today how it was calculated. I truly—

Q. Did anyone—

A. No, I don't.

Q. Did anyone at Boeing suggest to you that Boeing was compensating you for rendering services to the United States Government?

A. No, they didn't.

Q. Your understanding was that you had to sever all of your financial ties to Boeing if you—

A. Absolutely.

Q. —considered taking a government position. Was there any discussion with Boeing that perhaps the amount of the [94] severance payment might be increased at a later time depending upon how long you served in the United States Government?

A. No. There was no commitment on Boeing's part either directly or even implied that there would be any future payment associated with this job or anything else.

Q. Well, let's turn back to the first page of Government's Exhibit 70 or Government's Exhibit 111. Government counsel or Justice Department counsel asked you about the calculations for four years. How long have you actually served as Assistant Secretary of the Navy?

A. It is going on six years, over five years.

Q. Has Boeing made any further payment to you since the date of your retirement?

A. No.

Q. Have you asked Boeing to make any further payment to you since the date of your retirement?

A. No.

Q. In connection with your proposed appointment, Mr. Secretary, did you have to complete any financial disclosure forms?

A. Yes, I did. There is a standard financial disclosure form, and I don't recall the number of it.

Q. In connection with your proposed appointment, did you discuss with anybody in the Department of Defense the possibility that you might receive a severance payment?

[95] A. Yes. I discussed it with at least two people. One was Joe Duffy, who was the legal counsel that was used to process presidential appointees through the process, through the White House and so forth. And John Lehman.

Q. All right. First Mr. Duffy. He was legal counsel employed by the Department of the Navy?

A. That's correct.

Q. And Secretary Lehman as well?

A. Right.

Q. What did you tell first Secretary Lehman, and when did you tell him about a possible severance payment?

A. I can't remember when I told him exactly, and I am not sure I ever told him exactly how much.

Q. Did you have any discussions with him about severance payments before you actually received the payment?

A. Yes, I suspect it was before. I think it must have been before.

Q. Do you recall what you told Secretary Lehman?

A. Not really. I talked to him about the fact that it looks like to me that this whole thing was going to cost me about a million dollars to come into the government,

I remember telling him that. It is an easy number to remember.

Q. Did you tell him that you thought though that you might receive a severance payment?

A. Yes, I did.

[96] Q. Did he indicate that a severance payment might present a conflict of interest?

A. No, not at all.

Q. Did he say anything to you that you recall about a possible severance payment?

A. No. I never even recall it becoming an issue in talking to him.

Q. All right, let's turn then to Mr. Joseph Duffy from the Navy General Counsel's Office. Could you describe your conversations with Mr. Duffy about a severance payment.

A. Yeah. There was quite a few discussions with Joe Duffy because that was the nature of his job. His job was to see that I got processed through the system properly. I had made out a financial disclosure statement in the middle of the year sometime. After October 1, when I received my severance pay and left Boeing, I was getting ready to go over to the legal counsel for the Senate, and they want to review all your paperwork before you go in for a confirmation hearing. I mentioned to Duffy, hey, this thing has changed a bit, I got this severance payment and I sold some stock. And he said, just mark it on the form and initial it. He went with me when I went over to talk to the legal counsel for the Senate. And so, he was involved in the discussion we had there because it came up at that time.

Q. And do you recall telling him that you had received a [97] severance payment from Boeing?

A. Absolutely.

MR. LACOVARA: Your Honor, may I show the witness what has been marked and received in evidence as Defendants' Exhibit 85.

Q. Mr. Secretary, can you identify that document, Defendants' Exhibit 85?

A. Yes. This is—This is the financial disclosure statement. It looks like it is the last one to—You have to be careful because they have dates when different people signed them.

Q. Yes. Looking down about midway, do you recognize your signature on the first page of Defendants' 85?

A. Yes, in June.

Q. Can you tell from the date written there about when you signed it?

A. June 3.

Q. Is this the document about which you testified a few moments ago?

A. Yes.

Q. Turning to page 2 of that document, and directing your attention to the first line reading Boeing Aerospace Company, can you explain the entry $180,000 on that first line and what appeared to be circled initials on the form?

A. Yes. That's when I made that entry that I mentioned [98] previously, the 180. And below it is the 40 for the Boeing stock that I sold. So, those were two sources of income that I indicated after October 1, I wrote those in.

Q. Right. Next to the $180,000 handwritten entry is a check mark in a box marked over 100,000. Was that box checked when you originally signed this form on June 3, 1981?

A. Oh, yes. In fact, there is a copy of this floating around that shows it. Yes, it was in there when I signed it in June. The only additions that were made to this are the ones that I put in in writing myself.

Q. Upon the advice of Navy legal counsel?

A. That's correct.

Q. And you told Mr. Duffy the $180,000 figure you were inserting reflected a severance payment you had received in the interim?

A. That's right.

Q. Did Mr. Duffy suggest to you that receiving a severance payment raised a potential conflict of interest issue?

A. No, he did not.

Q. Do you recall who reviewed this form, this form SF278, which is Defendants' Exhibit 85?

MR. CLARK: I am sorry, the question is unclear to me. Everybody who reviewed it, or anybody that Mr. Paisley knows reviewed it, or who?

[99] MR. LACOVARA: Well, he can only answer from his knowledge.

Q. Do you know who reviewed this form?

A. Well, there are two people for sure I know reviewed it. Plus two others. The two that I know for sure reviewed it, one was Duffy and the other one was Jim McGovern, who was legal counsel for the Senate at the time, he is the Under Secretary of the Air Force now. And then these two people that signed it here besides me, they must also have reviewed it. I can't say they did, but they must have if they signed it.

Q. Thank you, Mr. Paisley. Coming now to your current position. You are still serving as Assistant Secretary of the Navy?

A. Right.

Q. Do you have any authority in that position to let government contracts?

A. No, I do not have contract authority.

Q. Do you make decisions whether to make purchases from contractors such as Boeing?

A. No. That's constrained to the acquisition system in the Navy.

MR. LACOVARA: Thank you. I would like to show the witness several other exhibits which have been offered in evidence. They are Defendants' Exhibits 86, 87, 88, 89, 90, and 91. Excuse me, it is 91 and 93 rather than 90.

[100] MR. CLARK: Your Honor, we have objected to these on the basis of relevancy because I don't see what

they particularly have to do with the nature of this case. I have tried to resist interrupting Mr. Lacovara's cross.

THE COURT: What kind of documents are they?

MR. LACOVARA: Your Honor, I am not going to go through them all. These are disqualifications, they are formal disqualifications involving any contracts that he or his wife has.

THE COURT: What relevance does that have?

MR. LACOVARA: That Mr. Paisley took all of the steps that these documents advise, as these documents show to avoid any potential conflict of interest or appearance of impropriety.

THE COURT: All right. I will allow them in. Objection overruled.

MR. LACOVARA: Thank you, Your Honor.

THE COURT: They are admitted.

BY MR. LACOVARA: (Continuing)

Q. Mr. Paisley, have you glanced at those documents?

A. Yes.

THE COURT: You don't have to have him testify from them, they are admitted.

MR. LACOVARA: Thank you.

Q. Mr. Paisley, do you recall being interviewed by agents [101] of the Federal Bureau of Investigation in about September 1982 in connection with the severance payment investigation?

A. Yes.

Q. Did you answer all the questions that were asked of you by the FBI?

A. Yes, I did.

Q. Did you tell the agents everything you were asked about and knew about concerning Boeing's severance payments to you?

A. Yes, I did.

Q. Did you conceal anything from the agents?

A. Nope.

Q. Since you became Assistant Secretary of the Navy, have you taken any action to benefit the Boeing Company?

A. I haven't taken any action to benefit any company. That's not the nature of the job I have.

Q. Thank you. Are your superiors in the Navy at this time aware of the fact that you received a severance payment from Boeing?

A. Yes.

Q. Are they aware that since 1982 the Justice Department has had an inquiry concerning the propriety of your severance payments?

A. Yes.

Q. Has Secretary Lehman asked you at any time to resign [102] from your position?

A. No. He couldn't get along without me.

Q. Has the Secretary of Defense asked you to resign?

A. No.

Q. Has the President asked you to resign?

A. No,

Q. You are still serving as Assistant Secretary of the Navy?

A. Yes.

MR. LACOVARA: Thank you, sir.

MR. TREANOR: No questions, Your Honor.

MR. BENNETT: No.

THE COURT: Do you have anything further?

MR. CLARK: Yes, Your Honor, if I can have just a moment.

REDIRECT EXAMINATION

BY MR. CLARK:

Q. Mr. Paisley, did you ever tell anybody at Boeing that you had been assured by Secretary Lehman that even if you weren't confirmed you would still be appointed to his staff in some capacity?

A. You know, that was asked me once before and I have jogged my memory and all— I can't remember that. I can't remember me every telling anybody that. I, I might have, I [103] might have, because I went on as a

consultant for him. So, maybe I did. Maybe I did tell somebody that. I really can't recall.

Q. Do you know individuals by the name of Paul Turner, Pete Hiskin?

A. Yes. Those are industrial relations people, personnel people.

Q. Boeing employees?

A. Yes, I think they both are.

Q. Does that in any way refresh your recollection as to whether or not you expressed that?

A. Those were the people I was talking to. If I would have said something like that, those are probably the ones I would have said it to because they are the ones I am dealing with.

Q. Did you ever receive any kind of severance payment to cover the period between when you left Boeing and when you went and assumed your position as Assistant Secretary of the Navy? In other words, when you were a consultant?

A. A check for that? Here is a check for severance payment for that item?

Q. Do you understand that you received any payment relating to that period?

A. No. No, I don't recall that. I don't remember that, to tell you the truth.

[104] Q. During the course of the time frame in which you were considering whether or not to leave Boeing and whether or not to be considered for your current position, at any time did Boeing come to you and give you a projected figure as to what they thought they were going to pay you for your severance payment?

MR. BENNETT: Excuse me, Your Honor. I don't think this is appropriate redirect. So, I object.

MR. CLARK: I think procedurally we are talking, in a sense I am doing a cross-examination after Mr. Lacovara's cross-examination.

THE COURT: Objection overruled.

A. Tell me the question again.

Q. Sure. The question is, at any time— I am sorry. The question seems to have alluded me for a moment, Mr. Paisley.

THE COURT: Well, you are going to have—

MR. CLARK: Could you please read the question back, Mr. Reporter.

NOTE: The question is read back.

A. I think— I don't know what you mean by give me, but someplace along the way I know for a fact, I think it was Little said that we are talking about $180,000 severance pay for you. So, somebody did do it, yeah. I knew that number, so I know I had to get it from somebody like from him.

[105] Q. Were you happy with that number when Mr. Little told you that?

A. I guess when all was said and done, yeah, sure, I guess so. I am sure I must have talked about it to my wife and all, but it didn't cover those things that are on the second page of this Exhibit 70, because if you would look at just those five items that are associated with prematurely leaving the company, they total up to 350,000 alone. So, it didn't even cover those. But, I was ready to go back and help John Lehman run the Navy. So, I think I must have said fine.

Q. At any point in time after you learned that Boeing was considering making a payment to you of $180,000, did you seek or undertake to persuade anybody at Boeing to increase the amount of that payment?

A. That is caled dickering, and I think I probably dickered. I couldn't tell you for sure I did, but I might have. I don't really recall. I don't, I don't think so. It doesn't seem like me to dicker over something like that, but I can't tell you for sure.

Q. In response to one of Mr. Lacovara's questions you said that you had prematurely retired, is that correct?

A. Yes.

Q. Why did you prematurely retire from the Boeing Company?

A. Why did I?

Q. Yes.

[106] A. Because the government wanted me to come to work for them. The Boeing Company thought it was a good idea for their employees to go serve. So I said, I am going to do it right, I am going to retire and really sever my relationship. And so, that's what I did.

Q. So, I am correct that you retired with the anticipation that you would end up working with John Lehman?

A. Yes. I thought, by the way, after I retired, I thought back and forth about this problem, and I finally said, I have just got to do it, sometime early in November or something like that. But, yes, when I left the company, that's what I had in mind.

Q. Now, you testified in response to some of Mr. Lacovar's questions about conversations you had with Joseph Duffy and John Lehman, is that correct? You have to indicate orally for the record, Mr. Paisley.

A. You say when?

Q. Was that correct that you had those conversations?

A. Yes, I did.

Q. At any time in your conversations with Mr. Duffy did you ever reveal to him how your severance payment had been computed?

A. No, because I didn't know then or now. I don't know how it was computed. I still don't to this day.

Q. At any time during your conversations with Mr. Duffy [107] did you indicate that prior to your receipt of a severance payment you had submitted a document to Boeing which compared the anticipated benefits you would receive as a government employee with what you might earn had you stayed as a Boeing employee?

A. I might have. I might have done that. I can't remember.

Q. In reference to Mr. Lehman, I assume that you didn't tell Mr. Lehman how your payment had been computed either, did you?

A. I think that I probably mentioned that to John Lehman, but I think it was before I came into the government.

Q. I am sorry, that you mentioned what?

A. That I had turned in this document. You asked me if I mentioned to Duffy that I turned in this document calculation, and I thought you asked me the same thing about John Lehman.

Q. My question was, I assume that you didn't tell Secretary Lehman either how the payment was computed?

A. No.

Q. Because you say, you testified you don't know how it was computed?

A. Right.

Q. Now, Mr. Lacovara showed you Defendants' Exhibit 85. Do you still have that, Mr. Paisley?

A. I have it, right.

[108] Q. Am I correct that this was the second one of these forms that you did?

A. No, it wasn't the second one that I did. It was updated a second time. I updated the first one. I didn't make out a new one.

Q. And am I correct that you updated it by these handwritten interlineations on the second page of the exhibit?

A. That's correct.

Q. The $180,000 and the $40,000, is that correct?

A. Right.

Q. And am I correct that that is entered opposite compensation for services?

A. Yes, the 180 is. I guess they both are in that category. They were both compensation for services.

Q. And that amount is your understanding of the amount you were paid as a result of the severance payment that Boeing made to you?

A. The 180? Yes. That is what it is. That is the severance payment.

Q. You also said you had conversations with Mr. McGovern of the Senate commitee?

A. Yeah.

Q. Did you make any— Did you tell Mr. McGovern—I assume that you didn't tell Mr. McGovern how your severance payment was calculated either?

[109] A. No.

Q. Did you tell Mr. McGovern that you submitted a sheet prior to Boeing prior to the receipt of the payment that compared your anticipated benefits—

A. No, I didn't have the kind of relationship with him that I would have that kind of conversation with him.

Q. Did you tell that to the FBI?

I. I think the FBI asked me, they were aware of it and asked me, and I think I said yes. I can't tell you I told them, but I do think they asked me.

Q. Was the exhibit which has been identified and admitted as Defendants' Exhibit 85, was that exhibit, were the changes executed on that document after you had learned that there was an FBI investigation?

A. This document?

Q. Yes.

A. Oh, no. The FBI investigation was in '82. This was in '81.

Q. In terms of the disqualifications that Mr. Lacovara asked you about, is it your testimony that you never did anything relating to Boeing while you have been in the Navy?

A. No.

Q. You never had anything that related to Boeing matters at all?

A. No, and I didn't say that.

[110] Q. You didn't say that? What is your testimony?

A. That I— The question was asked if I had ever done anything to favor, I think was the word, Boeing. And I said I have never done that for any company. I have done things that are associated with Boeing.

Q. So, am I correct that there were several periods when you were disqualified, but there were also was a period when you weren't disqualified?

A. That's right.

Q. And that Secretary Lehman had asked you to consider a matter which did relate to Boeing?

A. That's correct.

Q. And am I correct that the second disqualification that you executed came after the FBI investigation?

A. That's correct. It is sort of during, not after, it is sort of during.

MR. CLARK: Just a moment, Your Honor.

Q. In response to I think one of Mr. Lacovara's questions you answered that the total amount that you thought you received from Boeing as your severance payment was $183,000?

A. Yes.

Q. And I think earlier you said that they had told you you were going to receive $180,000?

A. Yes.

Q. Can you remember why there was that difference?

[111] A. I am trying to stretch my memory what this difference was. It may have been something that was associated with a discussion someplace along the line about moving or something, I am not sure. But it was 183, it wasn't 180.

Q. Was there a disparity in your income between the, the income you received as a consultant in comparison to the income you had received in your last position for the Boeing Company?

A. Yes, there was.

Q. And what was the approximate amount of that disparity?

A. I don't know. It was, it might have been that, by the way. By the way, that 3,000 might have been that. And I can't remember what the number was.

MR. CLARK: Thank you very much, Secretary Paisley.

THE COURT: Anything further?

MR. BENNETT: Your Honor, may I take one minute, I neglected to ask something.

THE COURT: One minute.

RECROSS EXAMINATION

BY MR. BENNETT:

Q. Secretary Paisley, as Secretary of Navy, you in the course of this case and the Department of Justice inquiry executed affidavits and declarations, is that correct?

A. Yeah.

Q. Secretary Paisley, referring to your declaration of [112] January 6, 1987, executed at the Pentagon, the following appears: No one at Boeing ever told me and I did not understand or believe that the severance payment was a supplement to my government salary or represented any compensation for my services to the government.

Do you recall saying that?

A. Absolutely.

Q. Is that true and accurate today?

A. It sure is.

Q. And in the same declaration, Secretary, it said that no agent of Boeing ever suggested to me and I never believed that the severance payment was intended to have any effect upon the performance of my public duties. Is that true?

A. Right.

Q. Is that true today?

A. Sure.

Q. In paragraph nine of that same declaration it says: The severance payment that I received from Boeing was fixed, final and irrevocable. It was not contingent upon White House approval of my nomination, upon Senate confirmation of the appointment, or upon my remaining in government service for any period of time. Nor was the payment affected by any change in my government salary, change in government position, continuation in government service for any particular period of time, or possible resignation at any time from the government's [113] employ.

Was that correct when you made that statement?

A. It is correct. In addition, it wasn't contingent upon me even going into the government.

Q. And is that true today?

A. Yes.

MR. BENNETT: Close out my minute, Your Honor, I just have one more question. May I, Your Honor?

THE COURT: You are pushing the minute.

MR. BENNETT: I am way past it, Your Honor. May I just have 30 seconds?

Q. You executed an affidavit, Secretary Paisley, on the 17 day, this was in 1984, I believe. Paragraph seven reads as follows: I believe that all necessary steps were taken to assure that at all ties with the Boeing Company were completely severed upon my retirement and upon my wife's termination from the company. I made no commitment to the company at the time of my termination. Moreover, at no time did any Boeing employee suggest or imply that I was somehow indebted to the company or should provide it with any special advantage. In addition, the Boeing Company made no commitments to me with regard to employment or reemployment terms and conditions. I did not understand and do not regard the severance payment I received from the Boeing Company as compensation for my government employment. I believed at the time and continue to [114] believe that severance payment is a common and accepted means of

severing one's financial interest in a prior employer. I remain firmly convinced that all reasonable actions have been taken on my part and the part of the Boeing Company to ensure that no apparent or real conflict of interest exists with regard to all actions surrounding my termination and surrounding my association with the company in my current position.

Did you believe all of that in 1984?

A. Correct.

Q. Is it correct as of today?

A. It is.

MR. BENNETT: Thank you.

THE COURT: Is there anything further over here?

MR. LACOVARA: Nothing further from me.

THE COURT: Do you have anything, just on that affidavit?

MR. CLARK: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARK:

Q. I would just like to ask you about the first affidavit that was made reference to, the one executed in 1984. Did you also make this following statement. I was told it was company policy to allow for severance pay in an amount to be determined [115] by the company management?

A. Yes. Let me explain that. I used to—

Q. Pardon me, was that truthful when you executed it?

A. Yes.

Q. Is that truthful today?

A. I have got to explain something. You people used practice and policy like they were the same thing. I have been educated on this in this case. I used to use the two terms the same way. Now I use the term policy when I know something is written, well articulated and under-

standable. I use practice as something that people practice and I am not sure if it is defined that well.

I never, ever knew that Boeing had a policy in those terms, never. But I used the two terms interchangeable, policy and practice. I don't any more.

Q. Did you ever know whether or not it was exclusively up to the discretion of the Boeing Company management as to how such a person would receive for a severance payment?

A. I didn't know how they did it. I have never been involved in determining one myself, and I don't know how they do it.

MR. CLARK: That's all I have, Your Honor.

THE COURT: Thank you, you may step down.

NOTE: The witness stood down.

[116] THE COURT: How many more witnesses do you have?

MR. CLARK: Your Honor, at this point we would introduce deposition testimony of the following individuals, with the following designations, Your Honor. Government's Exhibit 120 of the deposition of Mr. Wilson. Government's Exhibit 121 of the deposition of Mr. Little. Government's Exhibit 122, the deposition of Mr. Hebeler. Number 123 of the deposition of Mr. Mark K. Miller. Government's Exhibit 124 of the deposition of Mr. Charles P. Hagberg individually and on behalf of the Boeing Company. Government's Exhibit 125, the deposition of Mr. T.K. Jones. Government's Exhibit 126, the deposition of—I am sorry, strike that, Your Honor. Number 127, the deposition of Mr. Kitson. And 128, the deposition of Mr. Crandon.

And we have already filed with the Court the summaries of these depositions specifically highlighting which portions of those depositions we rely upon.

THE COURT: All right. Is there any objection to any of these exhibits?

MR. BENNETT: No, Your Honor.

THE COURT: They are admitted.

MR. TREANOR: We object to the summary that has been prepared by the Government. And I would respectfully suggest that with regard to defendant Crandon, this is a summary that was presented to us this morning. We object to the portions of [117] the summary that has been presented. We have no objection to the deposition being accepted in evidence.

THE COURT: Very well. I will admit the depositions and the summaries, and I will look at them both.

MR. CLARK: Your Honor, is it appropriate at this time for us to go through and indicate which of the Government's exhibits have not, have not been opposed by particular defendants to simplify the Court's tasks?

THE COURT: Well, it is time to recess for lunch. Why don't you go through, and you can get a list of those, and you can let me know what they are as soon as we come back. Maybe you don't want to put all of them in evidence. I don't know. Why don't you decide what you want admitted.

MR. CLARK: Yes. We have no further witnesses, to answer the Court's question.

THE COURT: All right. Why don't we do that. Why don't we recess now until 2:15, and you can give me a list of what else you want admitted that has not already been admitted.

NOTE: At this point a lunch recess is taken; at the conclusion of which the case continues as follows:

THE COURT: What additional exhibits did you want to have admitted?

MR. CLARK: Yes, Your Honor. Just to recapitulate where we are under the local rules—There obviously are [118] multiple defendants in this action, and some of the defendants have objected to some of the documents. Other of the defendants have not. The documents we received from Boeing and offered into evidence relating to Boeing, with a few notable exceptions, have not been objected to by Boeing. They may have been objected to by the other defendants for various reasons.

I think perhaps the best way to begin is to go to the objections of the defendants Paisley, Jones, Kitson and Reynolds because they seem to be in a rather generalized format, and perhaps we can address those and find out precisely what the objections are. In many cases they have—

THE COURT: Well, do you want to move for the admission of all the documents that you have submitted?

MR. CLARK: Yes, Your Honor.

THE COURT: Is that what you want to do?

MR. CLARK: Yes.

THE COURT: Why don't you have a seat then and I will find out if there are objections to any of the documents that the government has listed.

MR. BENNETT: Your Honor, we have submitted to the Court a list of the objections that we have made to their various exhibits. There are 119 of them, and I can go through each one of them, and I have my objections to each, but I think—

THE COURT: Are you serious about all those 119?

MR. BENNETT: No. That's what I am about to say, Your [119] Honor. I am very serious about some and some don't really matter too much to me.

THE COURT: All right.

MR. BENNETT: The ones that matter to me really fall in two categories. When we responded to the various discovery requests we went through all the Boeing files and we, as we were required to do, provided them all sorts of notes, notations, calculations sheets, little scribbles here and there. And there are a series of those kinds of documents, and I will have to get you the numbers of those in just a moment, Your Honor, where we don't know what a particular statement meant or didn't mean, whether it was a note of a phone call, who made it, when it was made, if it was contemporaneous with the call, but because—It is not an authenticity issue in the sense that these came out of Boeing files. We have objected to those kinds of things and to the extent that the

Government would rely on them. And it is difficult to know what they are relying on because they say intent isn't an issue. We object to those category of documents. And I will give you those numbers in a moment if I could have the Court's indulgence.

Secondly, on the calculation sheets, there are just a whole bunch of calculation sheets that various people in the industrial relations branch prepared. It is impossible to determine what, if any, were presented to the ultimate decision maker. I think you will see from Mr. Wilson's deposition [120] testimony, which the Government has introduced into evidence without our objection, he says he doesn't recollect seeing any and that he really was focusing on the, quote, reasonableness of the final number given all sorts of historical factors.

So, we would object to those documents. Not objection to them coming in to show that certain calculations were made, but objections if what the Government is saying is that these various calculations were in fact the final determining basis of the payments.

So, if I could have just a moment, Your Honor, I will give you the list of those, but I would like to look at at least these 119, if I may.

THE COURT: All right.

MR. LACOVARA: Your Honor, we have also filed a list of objections. Ours are essentially limited relevancy objections. And therefore, we of course do not oppose the Court's taking these exhibits for whatever they are worth. When I say limited relevance, I mean there are some of these miscellaneous scraps of paper that Mr. Bennett has just referred to and some documents from Boeing's files that are identified as to sender and recipient that relate to one of the recipients of the severance payments. We have objected, therefore, just to protect the record that they can't have any conceivable relevance to other defendants.

We have also objected to the extent that the [121] Government may be offering them, and I think they are not,

to show the state of mind or state of knowledge of any of the individual defendants. I think the Government isn't offering them for that purpose since the Government's view is that knowledge and state of mind are irrelevant. But that's essentially the kind of objection that we have imposed.

We have also lodged, as has counsel for Boeing, an objection to Government's Exhibits 110, 111, 112 and 113. As the Court will see, those are essentially, they are described by the Government as business records of Boeing related to each of these four men. 111 is Mr. Paisley. 112 is said to be business records relating to the severance payment to Mr. Reynolds, 113 to Mr. Kitson, and 110 T.K. Jones. They are in fact just collections of miscellanea produced by Boeing in the course of discovery. Most of them have never been authenticated. When asked about them in deposition, most of the witnesses were unable to say they have seen any of them.

So, we have lodged an authenticity objection. But, Your Honor, since this is a bench trial, we simply note those objections and have no serious concern if the Court wishes to view those for whatever they are worth.

THE COURT: All right.

MR. TREANOR: Your Honor, the only objection that we would make on behalf of defendant Crandon is to plaintiff's proposed Exhibit 114. As Mr. Lacovara has described, 110 [122] through 113 are relating to his clients. Exhibit 114 of plaintiff relates to my client. I would suggest, respectfully, that the documents which are within that exhibit number numbered 400, 402, 403, 405 and 406 do not meet even the threshold requirements for a business records exception thus making them admissible.

Similarly, in addition I should say, documents 400, 402 and 403 are illegible. We can't read them. I am not sure the Court would have any more success than we had. And therefore, I would simply note that objection for record and ask the Court to exclude those items.

THE COURT: All right. What is the purpose of 110 through 114?

MR. CLARK: Your Honor, let me explain how those exhibits were compiled. Those documents were, as I understand from my co-counsel, Mr. Jones, were produced by Boeing Company at a point later than they were originally scheduled to be produced, shortly before the pretrial order had to be put together and the exhibits submitted at that stage of the pretrial conference. And that's why they were grouped in a collective exhibit format because of the very late arrival of the exhibits. There seems to be no question about their authenticity. There seems to be no question that they are not in fact the documents that were provided by Boeing in response to discovery requests. But because of their receipts late from [123] Boeing it was only possible to put them in in the collective exhibit format.

THE COURT: What is the purpose of their admission? Why are you moving their admission?

MR. CLARK: The admission is being moved because they are grouped by defendants, 110, 111, 112, 113, and of course 114 as indicated by counsel for Mr. Crandon. They contain documents which we consider to be relevant, reflecting the thought process of Boeing in making the payments in issue. They come from Boeing's files in response to discovery requests. And that's why they are included, because they reflect a process whereby Boeing reached the final conclusion as to what payments to offer and how large of payments to offer.

THE COURT: Can you tell me what these contain that show Boeing's intent?

MR. CLARK: Well, let me give you just three examples, Your Honor. Exhibit No., collective Exhibit 111, number 689, relates to Mr. Paisley. And that document says, in discussing the issue of severance payment, this is an internal Boeing document produced by Boeing, quote-- Let me pick up the quote and go back. On the issue of the severance payment to defendant Paisley, the document

states, quote, Skeen, that's I take it to be the vice-president of Boeing, made rec, r-e-c, which I take to be recommendation, to SML, which we believe was Mr. Little, the executive vice-president of Boeing, if Paisley [124] ends up as a government official or as consultant, I support payment.

We think this goes directly to demonstrate that although it is not necessary for us to demonstrate intent or that Boeing felt they would receive some special benefit, that in fact that document indicates that there was some consideration given to the advantage of Boeing in having former Boeing employees in high positions in the Department of Defense and in the Navy.

In another example, in reference to the defendant Crandon, this is collective Exhibit Number 114, number 002741, termination pay recommendation memorandum dated January 25, 1982. It states, quote, Mr. Crandon will surely be an asset to Boeing in the NATO arena.

Similarly, in number, collective Exhibit 113 at page 2728, in reference to Mr. Kitson, internal notation accompanying termination pay calculation sheet dated May 27, 1982, notes that Kitson's, quote, job with the DOD is viewed as bigger than Crandon's and he has greater influence relative to BAC, which I would take to be Boeing Aerospae Corporation.

These are just indicative of why we think these documents are relevant and do relate to the process of decision making.

THE COURT: I am going to admit those documents. I have overruled the motion in limine regards evidence of intent. [125] I am going to admit those documents. What worth they have, we will determine at a later time, but they are admitted.

Now, what objections do you have?

MR. BENNETT: My objections were to those, Your Honor, primarily, because we don't even know who wrote most of them. And if Your Honor will look at them at the appropriate time, you will see it would be very unfair to draw any inferences at all without them being put in context.

Other than that, Your Honor, I object to Exhibit 35 of the Government's, which is apparently an excerpt from some internal Justice Department analysis of conflict of interest statutes. And it is about a three or four page document, and it is not a go-to-the-mat issue for me, but it doesn't lend anything to the case.

THE COURT: All right. What relevance would that have?

MR. CLARK: If we can have just a moment, Your Honor. Your Honor, co-counsel informs me that she believes that Government's Exhibit 35 was provided to the FBI from Mr. DeLauer, who is listed as a witness, who is going to testify on behalf of some of the defendants in this action and he is going to testify purportedly about conflict of interest. The document came from Dr. DeLauer, that would seem to me to be a clear indication of its relevance.

THE COURT: Well, I don't know whether he is going to testify or not. At this time then all of your exhibits with [126] the exception of Number 35 are admitted.

MR. CLARK: All right.

MR. BENNETT: Our objections are noted, right, Your Honor?

THE COURT: Yes. How many witnesses are you going to have?

MR. LACOVARA: Your Honor, we expect to be able to call only three witneses and to waive further witnesses after those three are called.

THE COURT: Very well.

MR. BENNETT: As I believe I mentioned this morning, the Secretary of the Navy has agreed to come here voluntarily at 3 p.m., and we would ask the Court's indulgence to take him up at that point if it is convenient in the examination of other witnesses.

THE COURT: Well, I will let you gauge how you handle your witnesses so that you finish with one at 3 o'clock and he will be ready to come on. How is that?

MR. LACOVARA: Has the Government's case been completed, Your Honor?

MR. CLARK: Yes.

THE COURT: I understand the Government rests.

MR. CLARK: Yes. That completes the presentation of our case in chief, Your Honor.

MR. LACOVARA: At this point, Your Honor, the [127] defendants Jones, Paisley, Kitson and Reynolds move for directed verdict.

THE COURT: I will take that motion under advisement.

MR. TREANOR: The same motion on behalf of defendant Crandon.

MR. BENNETT: And for Boeing, Your Honor.

THE COURT: I wil take all those motions under advisement until the end of the case.

MR. BENNETT: Your Honor, Mr. Lacovara is going to go first on behalf of the individuals, if that's all right, because I think if the three witnesses he refers to testify as I think they are likely to, we may not call any witnesses on behalf of Boeing.

THE COURT: Okay. Very good. Who is your first witness?

MR. LACOVARA: Mr. Thomas K. Jones.

NOTE: The Defendant Jones is sworn.

THOMAS K. JONES, a defendant herein, called in his own behalf, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. LACOVARA:

Q. Good afternoon, Mr. Jones. Would you for the record state your full name, please.

• • • •

[128] Q. You are known as T.K. Jones?

A. Yes, sir.

Q. Where do you reside?

A. I live in Mercer Island, Washington.

Q. Were you implied by the United States Government at any time between 1981 and 1985?

A. Yes, sir, I was.

Q. In what capacity?

A. I was the Deputy Under Secretary of Defense for research and engineering of the strategic theater nuclear forces.

Q. Would you just give us a very brief description of what your duties involved?

A. My duties involved giving technical advice to the Under Secretary for research and engineering concerning the nuclear weapons system programs of the United States.

Q. Who was the Under Secretary of Defense at that time?

A. That was Dr. DeLauer.

Q. Was he your immediate superior?

A. Yes, he was.

Q. Before you became employed by the United States in 1981, by whom were you employed?

A. I was employed by the Boeing Aerospace Company.

Q. For how long?

[129] A. I originally started work for Boeing in 1954. And then I interrupted that service for three years in the early 1970s to serve the government on the Strategic Arms Limitations Talks.

Q. Who was in charge of the SALT delegation at that time?

A. The head of the delegation as I recall was Ambassador Gerard Smith. The gentleman who I directly served and advised in that capacity was the honorable Paul Knitsa.

Q. SALT is the Strategic Arms Limitations Talks?

A. Yes, sir, it is.

Q. In connection with your appointment in 1981, did you have do you undergo security clearances?

A. Yes, sir, I did.

Q. And did you obtain those clearances?

A. Yes, I did.

Q. Do you know whether you had to obtain any political clearances?

A. During the process of that appointment it did become clear that I had to obtain political clearances.

Q. Would you explain how you learned of that?

A. Well, I received a telephone call from a Republican party worker out in the Seattle area. And as I recall the substance of the call, she asked me what had I done for President Reagan or for the Republican party that would entitle me to the job which Dr. DeLauer was urging me to take.

[130] Q. And what did you say?

A. Well, I explained that I was an engineer and not a political person, and that I hadn't done anything either for the President or for the Republicans.

Q. But you understood that some kind of political clearance was going to be necessary before you could get an appointment?

A. Well, my feeling at the end of the conversation was that whatever clearance requirements there were, that I had obviously flunked them and I was off the hook.

Q. Let's go back to the time when Dr. DeLauer and you discussed the possible position in the Department of Defense. Did you contact him or did he contact you about that possibility?

A. He contacted me through his principal deputy, Dr. Wade.

Q. Could you tell us what Dr. Wade told you?

A. Dr. Wade pointed out, as I had known, that the United States was terribly inferior to the Soviet Union in nuclear strength, and that as a result of my work over the last several years, including the work on the SALT delegation, that I was not only aware of what the problems were but capable of figuring out how to come up with the most cost effective solutions to those problems. And on that basis, and further committing that the administration was fully intending to redress the imbalance, he told me that I, he felt I had to [131] accept the job of helping to fix it.

Q. Thank you. At the time that you were considering whether to accept Under Secretary DeLauer's or Under Deputy Secretary Wade's consideration, did you consider the financial ramifications to you if you left, consequences if you left Boeing at this stage of your career?

A. Yes, I did.

Q. Can you tell us what those consequences seemed to be?

A. Well, it would seem to me that I was going to suffer some considerable income losses, and as well as some considerable losses as a result of having to sever all financial connections with Boeing. This included various savings plans, sick leave, retirement benefits and so on. Ultimately by the time I got through trying to understand the full impact, it got to where it was a fairly long list of problems.

Q. Did you ever prepare a written summary of the financial consequences of leaving Boeing?

A. I prepared several.

Q. I would like to show the witness Government's Exhibit 70, if I could. If the Marshal could obtain Government's Exhibit 60 and hand it to the witness. We will have an extra copy, Your Honor.

THE COURT: That's all right.

A. Is it Exhibit 60?

[132] Q. 60, yes, sir.

A. I don't know really quite how—

Q. Have you been able to locate Government's Exhibit 60?

A. Yes, sir, I have.

Q. And that appears to be a document that is consecutively numbered J and a series of Os 4 through J-29, is that correct?

A. Yes, sir.

Q. That has been offered in evidence. And, Mr. Jones, I would appreciate it if you would inform the Court whether that is a single document?

A. Well, it seems to be somewhat mixed up. One is that there are several documents here and, moreover, it seems the Xerox machine must have gotten lose on this and repeated some of the pages in a somewhat random fashion.

Q. Let's start on page J-4, just so the record is clear on this document. Is it correct that the first page, J-4 of Government's Exhibit 60, was prepared in 1971?

A. Yes, that is correct.

Q. And then turning to pages J-5 through J-10, can you tell us when those were prepared?

A. J-5 and J-10 was the first rough estimate that I prepared in 1981. And this particular group of pages was subsequently superseded by some of the later pages in this group.

[133] Q. All right. Was that portion of Government's Exhibit 60 at pages J-5 through J-10 ever submitted to Boeing?

A. Yes, sir, it was.

Q. Thank you.

A. And I think it is probably worth saying that this particular set of pages contained those things which it was convenient for me to estimate, on which I had the

input data and could conveniently apply it to this problem. At the time this was submitted to Boeing I made it quite clear to them that this was not a complete estimate, and that I felt that Boeing had more data than I did on the omissions to this estimate, and asked if they would please estimate the items which I was not in a good position to estimate.

Q. And is any portion of Exhibit 60 a document that you prepared that was not submitted to Boeing?

A. Oh, yes.

Q. Would you describe those pages so the record is clear.

A. If you like, I could go ahead and just chronologically go through. The pages starting J000011 through 14 were made subsequently by me, and these were my attempt to estimate the items which I had not had sufficient data and asked Boeing to estimate. And since I did not receive from them their estimate, I undertook to do the best job I could at estimating it.

While I mentioned to Boeing that I had made these estimates and I believe gave them a rough idea of the amounts [134] that I had estimated, I believe that I did not ever give them these pages.

Following that, starting at J000015 and 16, this was an update of the other, the original estimates which appeared on five through—

Q. 10.

A. 10. The amount of work required to refine the original estimates was great enough, it seemed more clear to start with a clean sheet of paper and try to straighten it out. Again, I did not give those pages to Boeing. They were pretty much for my own understanding of the cost problem.

Then in about mid-May, I think it was three or four days before I left Boeing, I was informed that the amount of severance payment would equal $132,000. At

that point I made the estimates shown on pages J000017 and 18. The purpose there was to try and recap where that left me, what the collective impacts were and what the various causes of financial impact were.

The pages from J000019 and on are duplicates of the earlier pages that I suggest, to avoid confusion, it is probably best if they simply be discarded from the exhibit.

Q. All right, thank you, Mr. Jones. Let's go back to the preparation of these documents that are part of Government's Exhibit 60, except for the first page which you testified was prepared in 1971. In the spring of 1981 were you aware of any [135] practice that you believed Boeing had concerning making severance payments?

A. Yes. I was aware that Mr. Plimal, for example, had received severance pay, and also the personal experience of having received severance pay in 1971 clearly told me that Boeing had a practice of severance pay.

Q. Did you know of any other instances in which Boeing had made severance payments?

A. Not firsthand. Secondhand I did.

Q. You had heard of other instances?

A. Yes, sir.

Q. What was your understanding of the nature of Boeing's policy or practice, if any, on that subject?

A. Well, my understanding was that Boeing had a fairly broad practice of trying to reduce the otherwise penalties to people who were accepting government service. And in some cases where severance from the company was required, severance pay was the mechanism they used. For, for example, local governments or other things where severance was not required, Boeing used other means to try and avoid the financial penalties of severance.

Q. You said that your understanding about Boeing's practice related to attempts to reduce the financial penalties or disincentives for settlement. Could you explain what you meant by that.

[136] A. Well, one of the things that was impressed on me by the personnel people when I was very young and first came to the company, as well as what I had deduced through my own ability to analyze the company's benefit plans, it was that a major feature of these benefit plans was that they were intended to discourage people from leaving the employ of the company and going to work for competitors. It is a very costly matter to separate someone and have to hire a replacement and get them broken in. And the penalties, as the plans originally envisioned, were considerable.

The fact of high interest rates, which you will recall were a fact of life in 1981, as well as double digit inflation which we were suffering at that time, tended to compound the impact of these incentives, retention incentives if you will, to the point where they were rather awesome. And it seemed to me that for people who were going into public service as opposed to quitting on their own volition and going to work for a competitor, that the company sought to mitigate these penalties.

Q. Your understanding was that they had no desire to penalize people who went into public service, and they might lift some of the disqualifications, is that correct?

A. I felt they were trying to be good corporate citizens.

Q. Before you prepared the document that is pages five through ten of Government's Exhibit 60, did you discuss with [137] anyone at Boeing whether you might be eligible for a severance payment if you went to work for the Department of Defense?

A. I believe that I did. And those people said that it was a possibility, but none of the people that I discussed it with were in a position of approving such payments. And so, while they could discuss it as a possibility, they could not make any commitments to it.

Q. Did they tell you how Boeing would go about calculating any payment they might make to you?

A. No, they did not.

Q. Did you know from any other source how Boeing might calculate a payment to you?

A. No.

Q. How did you come to prepare the document that we are referring to as that portion of Exhibit 60 at pages five through ten?

A. Boeing asked me if I would assemble my views on what were all of the financial impacts attendant with leaving Boeing.

Q. And you testified a few moments ago that pages five through ten of Government's Exhibit 60 were a portion of the financial impacts that you thought you would incur, is that correct?

A. Yes, sir, it is correct.

Q. You assumed that Boeing would be looking at other considerations?

[138] A. I specifically asked that they do that.

Q. So, Boeing didn't tell you what factors to include in any particular document?

A. No. And I must say that I wished that they had, but they didn't. They didn't even lead the witness, to use the parlance of your profession. It was sort of like a flat on the table question and they wanted to know what I thought, not my calculation of what they thought.

Q. Did you at the time that you had those discussions or at the time you submitted this document or indeed at any time up through the date you received a severance payment have any indication from Boeing that a severance payment, if made, would be intended to compensate you for serving the United States Government?

A. No. They told me what they thought it was for, and that wasn't it.

Q. What did they tell you a severance payment would be for?

A. They said that that was to, intended to liquidate all my interests in the company, financial and otherwise,

and to sever all financial ties, and to avoid any conflict of interest that might result from retained financial ties.

Q. Was it your understanding that the payment being paid to you was to compensate you for performing service to the government apart from anything being said to you?

[139] A. No, my understanding was quite the contrary to that.

Q. Mr. Jones, I would like to take just a few moments with you about this document on which the Government seems to rest its case. Look, please, at pages J-5 of Exhibit 60. The second line reads, basis, separate from Boeing, separate from Boeing, work for DOD four years and return.

What was the significance of the reference to the possibility of returning to Boeing in this calculation?

A. Well, the reference there was that the costs of not returning were not included here, and there were some other costs of returning if I did so, and they would either be dealt with separately or at some other time. Note one, you will recall, which appears on page J-7, addressed that. And a concern here that I had was the cost of not returning to Boeing tended to be the costs that I found difficult to calculate, and hence finally resorted to calculating them myself in the pages which begin on J-11.

Q. Which was a document not submitted to Boeing?

A. Correct.

Q. Now, without getting into more detail than I think is necessary for our purposes today, can you point to any of the items that were in this part of your financial impact analysis that in your judgment related to the diminished value of the benefits attributable to your prior service at Boeing?

A. Yes. The stock options not yet exercisable refer to [140] accumulations from prior service. The nonvested amounts in the voluntary investment plan, I think it was called VIP in the discussions this morning, were

also accumulations of prior service. There was some tax liabilities attendant to those, and I will leave it to your judgment as to how you categorize those. On that page I think all of the rest of the things were not in that category.

Q. Turn now, please, to J-11 of Government's Exhibit 60, which you testified was not submitted to Boeing but was part of your assessment of the financial impact of leaving Boeing at that time. Are there any items there that reflected what you believed to be the diminished value of leaving Boeing at that stage of your career?

A. Yes. And may I make sure of one point vis-a-vis this page is clear. The stock option forfeiture is a revision to the previous estimate. The reason for that is that the stock had split. And when I made my original estimate, I was not aware of that. So, you will find that same item duplicated here with a differing amount. The stock forfeiture, of course, was, as I indicated before, a result of prior service, as were all of the remaining items in this section of the estimate.

Q. Referring to page J-12, Mr. Jones. The figure $99,884 appears at the bottom of that page. Can you summarize for the Court what that financial loss was estimated to be?

A. I will attempt to do so. And if the Court will bear [141] with me, recognize that I am an engineer and not an economist, and so my calculations here may be more tortuous than someone more skilled than I might do.

But what I did here was to take the balances which I had in Boeing's voluntary investment program and financial security programs. These were amounts that had accrued up to May of 1981. And these particular investment plans were tax sheltered in various ways.

What I did here was to in essence take the balances in those accounts and project them to age 65, which would have been the age at which I would have withdrawn. This assumed that I did not continue to work for Boeing,

they did not continue to add any more to the accounts. It simply took the amount on the books at the time that I resigned—

Q. But you had to withdraw them to resign to go to work for the United States Government?

A. So, I took there the penalties of withdrawing, which meant that I lost some of the assets because they were nonvested, and I also paid tax on the amount of income thereby derived.

Q. Is it fair to say that the $99,000 figure was your assessment of the loss that you would incur because of prematurely withdrawing your VIP and FSP benefits relating to your prior employment by Boeing?

A. Yes, sir.

[142] Q. Turn to the next page, J-13. That page is headed retirement income. And you have a figure that you calculated in this document which was not given to Boeing, I gather, of $96,873, which I would ask you to explain to the Court the significance of.

A. Again, what I did here was to take the amount of credited service that I had on the day that I resigned from the company, recognized that had I not resigned from the company that amount of service and benefits would be protected, would have been protected against inflation. Based upon the percentage that I thought, inflation percentage that I thought might endure, and interest and taxes and so on, I calculated how much lump sum in cash it would take in 1981 to give equal outcome to the value which I had on the books as of 1981.

Q. All right. Without going through all of these items, Mr. Jones, is it fair to say that in doing your financial impact you considered a variety of factors, some of which related to income you might lose in the future because of a salary differential and loss of value or benefits that were already attributable to the time you had served Boeing?

A. Yes. Indeed, I tried to think of all the possible effects that I could think of.

Q. At the time that you prepared these calculations, by whom were you employed?

A. I was employed by Boeing.

[143] Q. Had you yet been appointed to any position with the United States Government other than your 1971 to 1974 position?

A. No, sir, I had not.

Q. Were you in your mind assured of appointment as Deputy Under Secretary of Defense?

A. No, I was not. And as a matter of fact, Dr. DeLauer had made that very clear from the outset, that he could not hire me, he could only submit my application and endorse it.

And moreover, it was, I was very aware that a fellow I had known for quite a number of years had separated from his previous employer, sold his house and moved to Washington, bought another house, and was sitting there in the Pentagon doing work for the government when the fellow who wanted to hire him had the unpleasant duty of telling him that he is sorry, the appointment hadn't come through, and he was not employed.

So, I was quite aware that not only was I not appointed, but there were risks that I might never be.

Q. Did you discuss with anyone in the general counsel's office at the Boeing Company the permissibility of accepting a severance payment before joining the Defense Department?

A. I am having a little trouble with the wording of the question. I did not make any direct discussions with them. I did, however, mention this to Dr. DeLauer.

Q. I am sorry, I am referring to discussions with anyone [144] at the Boeing Company, general counsel's office.

A. My apologies, I misunderstood your question.

Q. I apologize.

A. Yes. I talked to Mr. Albrecht, who at that time was the company's counsel.

Q. General counsel?

A. General, I believe that is correct. And I asked him, I went to see him to make sure that I understood all of the rules and regulations and other things that I should comply with in the processing of severing from the Boeing Company and joining the government.

Q. Was it your opinion that Mr. Albrecht had some expertise in these matters?

A. I believe he did, yes.

Q. Do you recall what your basis was for believing that?

A. Well, he was corporate counsel. And, moreover, he told me that he had called someone in the office of the general counsel in the Department of Defense and asked them specifically whether any of the rules had changed since the last time that Boeing made severance payments, and whether the large amounts that seemed to be being considered at that time would pose any problem. He said that having checked, he did not see any problem.

Q. Thank you. Did you discuss the possibility of receiving a severance payment with anyone in the Defense [145] Department before you were appointed Deputy Under Secretary of Defense.

A. Yes, I did. I mentioned it to Dr. Wade from time to time. He called me in for an interview. And I think the most important discussion I had was with my boss to be, Dr. DeLauer.

Q. The Under Secretary of Defense?

A. The Under Secretary.

Q. Would you relate that conversation.

A. I told him that I had received severance pay from Boeing on a prior occasion, and thought it a possibility that I might receive severance again. I wanted first that he know about it. I felt that was very important, because he as the future recipient of my work, my recommendation and so on, had more than anyone else to be aware if there was any possibility of any conflicts of interest. And I also wanted to make sure as to whether or not he

felt there was no problem and felt that severance pay was acceptable.

Q. What did he tell you?

A. He told me that there was no problem, that he had received severance pay, and that to his knowledge everyone or almost everyone joining the government at my reporting level was going to get severance pay from their previous employer.

Q. When you did finally receive a severance payment from Boeing, do you recall the date on which that was done?

A. It was on the same day that I resigned from Boeing.

[146] Q. What was that date, sir?

A. I believe it was May 19, 1981.

Q. By whom were you employed on that date?

A. I was employed by the Boeing Company.

Q. Thank you. When were you appointed Deputy Under Secretary of Defense?

A. Well, depending upon which piece of paper you believe, it was either June 1 or June 4.

Q. But no earlier than that, is that correct?

A. No, not earlier than that.

Q. Was there any indication that the amount of the severance payment that was being made to you was in any way variable depending upon what might later happen to your government service if you entered government service?

A. On the contrary, it was my understanding that that was fixed, there wasn't going to be any change to it no matter what happened.

Q. If you were to leave earlier than four years, for example, you wouldn't have to refund anything to Boeing?

A. No. It was a final payment that was said to sever all financial connections that I had with Boeing. And, therefore, I felt that they were severed and there was no possibility of any reconsideration one way or the other.

Q. Did you have any discussions with anyone on Dr. DeLauer's staff about the propriety of obtaining a severance [147] payment or the fact that you were obtaining a severance payment?

A. Yes, I did. I had discussions with Colonel Hollander. And Colonel Hollander's function in this matter was I think in many ways comparable to functions which Joe Duffy provided for Mr. Paisley. Basically it was his job to keep all the paperwork coming and get all the required approvals, whatever they were, and make sure that I understood all the requirements and complied with them.

Q. Do you know whether or not Colonel Hollander ever consulted the General Counsel's Office at the Department of Defense concerning your severance payment?

A. Yes. I had asked Colonel Hollander two questions because I was, I still wanted to make sure that severance payment was acceptable not only to my immediate boss, but to the Department. And so, I asked him about severance payment. I told him that I was likely to receive one. And I also asked him several questions regarding my wife's connection, my then-wife's connection with the Boeing Company. Again, in my presence Colonel Hollander called the offices of general counsel and ran both of those questions through them and gave me their answer.

Q. What was the answer that Colonel Hollander gave you on each of those issues?

A. The answer was that he thought it possible that my wife could have continued to work for Boeing, but that it would [148] look bad and we should make some other arrangement.

Q. And what did you do?

A. And the severance pay was not a problem.

Q. With respect to your wife's employment at Boeing which might look bad although was not prohibited, what did you and your wife do on that issue?

A. It was later decided that everyone's requirements could be taken care of through a leave of absence. This

combined with the fact that she and I had a property settlement agreement, that no matter what her financial situation was, I could not benefit thereby. I think for those reasons it was decided that a leave of absence would do. So, she took the leave of absence, stopped working for Boeing, and went to work for a not for profit organization here in the area.

Q. Now, in your position at the level, reporting level that you described, were you required to file financial disclosure forms with the government?

A. Oh, yes, sir, I was.

MR. JONES: Your Honor, we have raised an objection as to the relevancy of the disclosure forms to the whole proceeding. And if that's what counsel is going to get back into, we object as to the relevancy of whether the severance payment was disclosed on a disclosure form or not.

THE COURT: I am going to overrule the objection. But I am not sure how probative it is. We are spending a lot of [149] time on what he did in preparing forms and who he got advice from. Ask him what he did on the disclosure form, but let's move on.

MR. LACOVARA: I will do that, Your Honor. It is Government's Exhibit 30, and I think it is highly important that the Court understand what happened and who reviewed this form. And if the Marshal could present the witness with Government's Exhibit 30, I would appreciate it.

THE COURT: He should have it there.

A. I have it.

Q. Is this a form that you signed in the first month of your employment as Deputy Under Secretary of Defense?

A. Yes, sir.

Q. Referring you to page 2 of the form where there is a reference to the Boeing Company, would you tell the Court whether you included the amount of your severance payment on that page and how you came to do that?

A. The amount was included on it, and I had considerable difficulty trying to understand precisely what were the Department's or the government's requirements for trying to fit the individual types or pieces of income which I had received from Boeing into the various lines and squares and check-off blocks of this form.

I found it necessary to seek advice on what was wanted. The gentleman who I contacted I believe is David Rome in the [150] Office of General Counsel. I explained to Mr. Rome what kinds of income I had received. I asked him what he wanted to do. And he explained to me that what was required was the total amount and from whom it was received. And so, that is what appears on this form.

It is my understanding from a very recent study completed by the National Academy of Public Administration on the presidential appointment process, dwelled at some length on this form, pointing out that something on the order of 70 percent of the people having to negotiate its rocks and shoals had difficulty, and 25 percent had major difficulty. Apparently the legal counsel at all levels also has difficulty. And I must say I certainly did.

Q. Referring you back to page one of Government's Exhibit 30, do you recognize the signature of Under Secretary DeLauer at the bottom of this page?

A. Yes, sir.

Q. Did he review this form, to your knowledge?

A. Yes, he did.

Q. All right. Was he aware at the time that you had received a severance payment from Boeing?

A. In addition to telling him that I might receive a severance pay in the initial interview, before coming to work for him I told him that I in fact had received such payment.

Q. Would you please read the two sentences of the [151] supervisor's certification signed by the Under Secretary of Defense, Mr. DeLauer.

A. I have reviewed the interests reported on this form in light of the duties required by the reporting in-

dividual's position. I am satisfied that there is no actual or potential conflict of interest.

Q. Thank you. When you were interviewed by the Federal Bureau of Investigation in 1982, did you cooperate in that inquiry?

THE COURT: That is stipulated to.

MR. LACOVARA: Thank you, Your Honor.

Q. When you resigned from the Department of Defense, did you receive any citations from the Secretary of Defense?

A. Yes, sir, I did.

MR. LACOVARA: Thank you. Your Honor, we will be offering Defense Exhibit 166, which is the citation from the Secretary of Defense to Mr. Jones. I can ask the witness to read it. I don't think the Government has any objection to it.

THE COURT: Any objection?

MR. JONES: Not to the reading of it, no.

THE COURT: All right, it is admitted.

MR. LACOVARA: Thank you, Your Honor.

Q. When did you resign from the Department of Defense?

A. I believe it was in October 1985.

Q. Since that time have you continued to consult with the [152] Department of Defense?

A. Yes. The Department retained me as a paid consultant for another couple of months. And in January I asked that I be removed from paid status, and they changed that to unpaid status. And I believe that they renewed that recently again.

Q. How recently have you actually consulted with the Department of Defense?

A. Friday.

Q. Friday of this month?

A. Yes.

MR. LACOVARA: Thank you, sir. Your Honor, I have no further questions of Mr. Jones. And as I mentioned, we arranged for the Secretary of the Navy to

appear voluntarily. I realize it is unusual, but I wonder whether the Government would be willing to defer the cross-examination of Mr. Jones until after five minutes of testimony from Secretary Lehman.

THE COURT: Do you have any objection?

MR. JONES: I would prefer not to delay the cross-examination of Mr. Jones.

THE COURT: All right, why don't you get up there and cross-examine him then.

CROSS-EXAMINATION

BY MR. JONES:

Q. Mr. Jones, I would like to ask you several questions [153] about the Government's Exhibit 60, particularly pages five to ten that I believe you testified were the only pages that you prepared that were submitted to the Boeing Company. Earlier I think you testified that your consideration of the payment or that your understanding of it was that they were used to reduce the penalties that would come to, for making government employment, partaking government employment. Mr. Lacovara pointed out or you pointed out in response to his questions three items on page five that it appeared to you were in consideration of past rights, financial obligations that accrued to you. I would like to ask you about some of the other indications here.

Isn't it true, for instance, on the closing costs on a house purchase, that didn't have anything to do with rights that had accrued to you on your employment with Boeing, did it?

A. No, it did not.

Q. And it would have then had an impact only when you left Boeing to go work for the government, is that correct?

A. It was the kind of thing which would have occurred if I left Boeing and gone to work for anyone in

any other area. But in this case since I was more likely than not to go to work for the government, yes.

Q. And I suppose the same thing, costs in the future from transferring from the Boeing Company to the federal government in Washington dealt with house hunting costs, the next item on [154] page five?

A. Yes.

Q. And then we come to the next item that you listed there in your rough calculations of moving costs not reimbursable. I take it that those were costs also associated with your taking employment with the government rather than for past services you performed for Boeing?

A. That's correct.

Q. When you say that they were not reimbursable, not reimbursable by whom did you mean?

A. I took my estimate of what reimbursement might be received from the government for moving costs and subtracted that from my estimate of what might be the actual costs. So, that was the net difference.

Q. So, this was the difference between what the government was willing to pay you to move you across the country?

A. Yes.

Q. And what it actually cost or what you thought that it might cost you?

A. What I thought it might cost, yes.

Q. And that difference then, no part of it was otherwise—You were not otherwise entitled to that difference because of your past service with Boeing, is that correct?

A. I am not sure that Boeing's entitlements are, but I [155] have no way to say that it was.

Q. Did you expect to get any moving costs from Boeing for moving across the country to work for the federal government?

A. I really don't understand that question.

Q. I guess I am trying to find out or to draw the distinction as to the, that this difference in the moving costs was a difference only between what the government

was willing to pay and had absolutely nothing to do with what Boeing was going to pay you?

A. That is probably so. I think probably the right way to answer that is that the estimates that appear on these pages and in the subsequent updates to these pages and to the other estimates which are involved here are my attempt to take into account all of the costs, including those of the prior service, those that had nothing to do with Boeing, but only with the cost of accepting employment with the government.

Q. And I gather—

A. I tried to list everything.

Q. And I gather that the part of the moving costs here had nothing to do with Boeing but rather only had to do with accepting government employment?

A. Yes. I think that is fair to say that.

Q. The next item that you listed was lost salary during transition. What were, what were you referring to in that item?

A. Are you referring to something on page five?

[156] Q. Yes, on page five. J-5, right below moving costs not reimbursable, there is an item that I read, lost salary during transition.

A. Whatever it was, there aren't any numbers in here that remain. So, whatever it was, it is, whatever it might have been, it was marked out.

Q. Are there some numbers on the page that were marked out?

A. Yes.

Q. Did you mark them out?

A. Yes.

Q. Do you know why you marked them out?

A. No.

Q. Do you know why you put them there to begin with?

A. No. The fact that I marked them out must have been I decided that they shouldn't have been there.

Q. With regard to the next item, move-in costs, those too I gather are related solely to your moving from Seattle to Washington to take employment with the government, is that correct?

A. Yes.

Q. So, each of these items that we have talked about just now during this cross-examination were items that were not related directly to your employment with Boeing, but rather were occasioned upon your changing jobs and coming to work for [157] the federal government?

A. That is correct.

Q. There is another set of categories toward the bottom part of the page. One more question with regard to those. I gather that each of those were a one time cost that were not recurring in any manner later on during your government employment?

A. Yes, that is correct.

Q. Let's go to the second category, where you have a group of items listed under the heading yearly costs. The first one is salary difference. And the numbers look to me like there is a $71,000 minus $51,000, with a difference of 20,000. Could you explain what that difference is?

A. It was my then estimate of the difference between my then Boeing salary and the salary the government was paying for that job as of that date.

Q. And isn't it another way to say that, that the $20,000, that is the differences that needed to be added to the anticipated government salary to make it equal to your then current Boeing salary?

A. Those are your words, they are not mine. I would say it is technically correct.

Q. Thank you. Isn't another way to say that still further, is that the $20,000 is the amount that your government salary of 51,000 would have had to have been supplemented in [158] order to equal what your Boeing salary would be?

A. Again, those are your words. What I did was put here on the paper the thing that says salary difference. I gather what you are trying to do is put words in my mouth, and I don't really think those words were in my mouth or in my head at the time I made this estimate.

Q. But I gather that a difference is, you have got a quotient, I am not a mathematician or an engineer, but I imagine that when you have a subtraction figure like this and you come up with a difference, that it is the difference then that makes—

THE COURT: I think I can figure that out.

MR. JONES: Thank you, Your Honor.

Q. And as to each of these, as to the salary difference, this is under a yearly cost, and I gather then from the page that you anticipated that going on for four years?

A. I had promised Dr. DeLauer that I would stay there for four years. And that was my plan. I am not sure if it was his, but it was mine.

Q. This is the plan that you undertook when you made this rough estimate and submitted it to the Boeing Company?

A. Yes.

Q. There is also the next item of the yearly cost is the VIP company contribution. I gather that this is not the contribution that you make, but rather, or under any savings [159] plan that comes directly out of your salary, but rather was the contribution that the company would make?

A. Yes.

Q. And that is the amount that it would have made over the four years you were going to be, the anticipated four years that you were going to be with the Government that it would not otherwise make if you had simply resigned from Boeing?

A. To make sure that this is not misunderstood, this is a yearly cost, so that would be a contribution per year.

Q. So, in your factoring the total cost you multiplied that factor by four for four years, is that correct?

A. Yes.

Q. And the same rationale applies to the financial savings plan, which is the next item?

A. Yeah.

Q. And as to the insurance costs, both for group life and for group medical, dental and vision, which is the next item there, those were costs that you anticipated or those were benefits of your Boeing employment that you anticipated not getting while you were a government employee, is that correct?

A. That is a correct statement, yes.

Q. And finally, on the cost of living in the D.C. area, you listed that as an item that would be included each year as an annual portion, a yearly cost of your taking employment with the government, is that correct?

[160] A. Yes. I am not sure what the numbers are there because I had terrible uncertainties as to how to estimate that.

Q. Thank you. And because this was the, I think you have testified were the only pages up through J-10 that were submitted to the Boeing Company, is it fair to say that except for the items that you listed on your direct examination of the stock options and the nonVIP, nonvested VIP amounts and the possibility of the tax occurring solely because you were taking government employment or were yearly recurring costs of salary and benefits.

A. That is a fairly involved question. I think in order to avoid confusion it is necessary to understand that my submittal to Boeing consisted of two parts, one which you see on the paper you have been discussing here, and the other was a verbal listing of those things which I had not calculated which I had asked them to calculate. But between the two, it was intended to be as complete a listing of all costs as I was able to come up with.

Q. Thank you. I would like to move to a few of those other items that you testified about, particularly on pages J-11 and 12 and J-13 where you were talking about particular tax sheltered accounts. When you testified about those, you said that your calculations on those pages were based upon the projected dollar loss that you would take by leaving Boeing [161] prior to age 65, is that correct?

A. We may have a semantics problem. I don't think we have a disagreement. What I tried to do was to estimate the present value of present assets projected to my retirement age of 65 years. I believe that is a more correct way to characterize it, but I am not positive.

Q. I think you are right. We don't have a real disagreement as to what was there. Let me ask you, with regard to the retirement accounts and the VIP and FSP programs, you did receive the amount that had accrued and vested in those accounts for your account?

A. Yes, I did.

Q. And these projected losses that you are talking about are only for those that are in a sense, would not be gains during the years after you had left Boeing, is that a fair statement?

A. I am not sure because I think our language is somewhat different on describing the economics of this. I did include, I did recognize in the accounts that I had cash in hand as a result of receiving the vested amounts, and that some of that of course reverted to the federal government in the form of income taxes. What I did here was to take into account the taxes paid in 1981, taxes that otherwise would have been paid at age 65, interest rates that would have accrued had the amounts on the books been left on deposit, and the rate that I [162] would earn on the money that I got out of the accounts and was able to invest in some other vehicle.

So, I tried to take into account all the tax and interest consequences and try to come up with a present value

figure in 1981 of the consequences of having to roll that amount of money out of those sheltered plans.

Q. So that what I hear you saying is that you figured the present value in 1981 of what this would have been worth to you when you retired?

A. Yes.

Q. On a projection basis?

A. And to make sure that I am not introducing confusion here, the calculation assumed no other contribution by Boeing after 1981 as of course I had severed from them.

Q. Thank you. I want to move on to the one area that you raised a little bit briefly in the latter part of your testimony. That is the matter of disclosure. As you are aware, that the Government's position is that the matters of disclosure are irrelevant, but I wanted to ask you exactly what you did exactly tell Dr. DeLauer and what he told you. I believe you testified that Dr. DeLauer told you that he had received a severance payment when he had joined the Government, is that correct?

A. He did.

Q. Did he tell you either how much of a severance [163] payments he got or—

A. No.

Q. Did he tell you how his severance payment was calculated?

A. No, he did not.

Q. Did he tell you if he knew how his severance payment was calculated?

A. He didn't tell me whether he knew or not.

Q. And you did not disclose to him, I believe you testified, how your severance payment was calculated?

A. I couldn't, I didn't know.

Q. Thank you. When you made the disclosures to Dr. DeLauer and on the financial disclosure form that you signed, did you receive any sort of official statement of approval as to the, as to your acceptance of the severance payment?

A. Well, I specifically brought up the question with Dr. DeLauer for the purpose of making sure that he approved of it and it was acceptable to him. And moreover, to make sure that he was aware of it initially, that it was a possibility, and finally aware of it that I had in fact received it.

The reason for bringing the same subject up with Colonel Hollander, who in turn brought it up with the Office of General Counsel, is that I wanted to make sure that it was acceptable to everyone. I had that same reason when I brought it up with Mr. Albrecht, because I felt that my main—

[164] Q. They didn't give you any sort of written statement that said this severance payment meets all the qualifications for an approved severance payment?

A. No, they did not.

Q. Finally, I want to ask about your vested plans. The payments for the amounts that had accrued to your benefit in those accounts, the VIP and the FSP, you received your payments from those by separate check, is that correct?

A. Yes, sir.

Q. And it was not then a part of the severance payment check of $132,000 that you received, or minus the withholding taxes?

A. It was a separate check. I believe there were two separate checks, if my memory is correct.

Q. And those two separate checks would be one for what?

A. One was for the voluntary investment plan and one was for the finanical security plan. I believe the reason that they were separate checks is that the tax treatment is somewhat different on each of those plans.

MR. JONES: Thank you.

THE COURT: Do you have anything further?

MR. BENNETT: Your Honor, I do, but could I wait until after the Secretary testifies? I have about three or four questions.

THE COURT: Well, let's do them right now. You can do [165] three or four questions very quickly.

BY MR. BENNETT:

Q. Mr. Jones, did you have an agreement with Boeing that you would come back to Boeing after you left the government?

A. On the contrary, sir, it was made very explicit that I was not allowed to promise Boeing that I was going to come back. And it was also very explicit that Boeing could not promise to rehire me. And as you will see from some of the financial calculations here, the fact that Boeing could not promise to rehire me was the largest single economic impact in this whole set of calculations.

Q. In fact, Mr. Jones, isn't it fair to say that initially after you were leaving the government from your present post, you were going to be going to work for General Dynamics? Isn't that a fair statement?

A. Well, I promised Dr. DeLauer I would work for him. And therefore, I felt going somewhere else at that point would have been wrong. But on the other hand, in the process of leaving the government I felt I was a free agent and did consider offers from other companies.

Q. When you were holding your government position as deputy to the Under Secretary of Defense, am I correct that you prepared and provided an affidavit in 1983? This is Government's Exhibit No. 31, Your Honor, which has been [166] received in evidence. Do you recollect that, Mr. Jones?

A. Yes, I do.

Q. Mr. Jones, on the second page of that affidavit it states as follows: I must emphasize in the strongest terms that at no time did I or the Boeing Company take the initiative to secure for me this or any other government position. The initiative came from the government. To avoid conflict of interest it was necessary to sever all ties with Boeing. Company officials were very specific on

this point. My understanding of the rules is that I had to terminate my employment with Boeing and also sever all financial ties that could in any way allow me to receive financial benefit from decisions that I might make as a government employee. I have fully complied with these rules and have gone beyond them to avoid appearance of conflict.

Did you make that statement?

A. Yes, sir, I did.

Q. Was it true and accurate then?

A. Yes, it was.

Q. Is it true and accurate now?

A. Oh, yes.

Q. And I believe on page 4, I just have one more provision I would like to read to you. Although I do not recall all details of my conversations with Boeing personnel regarding my severance payment, I am absolutely certain that no [167] one ever directly or indirectly suggested that it was intended to be an addition to my government income. In fact, I felt that the severance payment was the accepted means by which I could completely sever my financial ties with Boeing. Moreover, no effort was made to conceal this payment.

Did you make that statement then?

A. Yes, I did.

Q. Was it true then and is it true now?

A. Yes, it is.

Q. And finally, did you say: Upon resignation from the Boeing Company I was told by Boeing personnel that the financial settlement I received should be reported as income on my tax return and disclosed as income on financial disclosure statements required by the Ethics in Government Act. I reported the amount of the financial settlement on both forms.

Was that true then and is it true now?

A. Yes, it is.

Q. And am I correct that the total financial impact which you submitted to the Boeing Company as your

losses was well in excess of the severance payment which was given to you?

A. Yes it was. It was very far in excess of that.

MR. BENNETT: I have nothing else, Your Honor.

MR. TREANOR: I have no questions, Your Honor.

MR. LACOVARA: I have no redirect, Your Honor.

THE COURT: Thank you, you may step down.

[168] NOTE: The witness stood down.

MR. LACOVARA. May we call our next witness, Your Honor.

THE COURT: Yes.

MR. LACOVARA: John F. Lehman.

MR. TERPAK: Your Honor, I would also like to introduce to the Court Mr. Hugh O'Neil who will be representing the Secretary's interests in this matter.

NOTE: The witness is sworn.

JOHN F. LEHMAN, a witness called by counsel for the defendants, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. LACOVARA:

Q. Good afternoon, Mr. Secretary. For the record, please, would you state your full name.

A. John Lehman.

Q. And by whom are you employed?

A. The Department of the Navy.

Q. What is your title, sir?

A. Secretary of the Navy.

Q. First let me thank you for appearing today. Are you here voluntarily, sir?

[169] A. Yes, I am.

Q. Thank you. Just by way of prefatory note, Mr. Secretary, the Department of Justice has stipulated that the Department of Defense and the Department of the Navy has had no reservation about the quality of the service of any of the defendants in this case, including Assistant Secretary Paisley and Mr. Kitson. And therefore, my questions of you will be more brief than they otherwise might be.

Do you know both Secretary Paisley and Harold Kitson?

A. I do.

Q. And they were or are your subordinates?

A. That's correct.

Q. Did you participate in recruiting Assistant Secretary Paisley?

A. I did.

Q. Did you know that he was employed by the Boeing Company at the time?

A. Yes, I did.

Q. During your discussions with him about the possible position of Assistant Secretary of the Navy, did he discuss with you any of the financial impact on him of leaving the Boeing Company at that time?

A. Yes, he did. We had rather extensive discussions at the time. And we did discuss it at length because that was a primary reservation that he had about coming to work for the [170] government. And it took a considerable amount of persuading over some weeks.

Q. You made an effort to persuade him to accept the position?

A. Yes. I had selected him as my first choice to take over the responsibilities for all research and development for the Navy and Marine Corps. And I went after him actively to recruit him.

Q. Did you understand, sir, from those discussions what the size of the financial impact might be if he accepted your offer?

A. Well, the experience I had tried to persuade Mel was very similar to other experiences I had during that first year in putting my team together at the Navy Department. And that is, going after middle senior management people as opposed to people about to retire or new sort of lower entry level people, my experience has been they are by far the hardest to recruit because of

the practice that industry has evolved of what is lately come to be called golden handcuffts in the industry. Your middle management, productive management at the senior vice-president level are given financial incentives that are designed to prevent them from leaving the company. And I have repeatedly had problems recruiting people because of those golden handcuffs. And this was a major consideration in my discussions with Mel, as it was with a number of others of my [171] senior people.

Q. Thank you, sir. Did Assistant Secretary Paisley at that time ever give you a sense of the size of the financial impact he might incur?

A. Yes. He told me that his financial advisors told him it could cost him in the neighborhood of a million dollars to take the job. And that was what I heard from another of my Assistant Secretaries as well.

Q. Thank you. Did Mr. Paisley ever mention to you the possibility that he might receive a severance payment if he left Boeing?

A. Yes. It was mentioned in passing. But that, as I say, along with the practice of the golden handcuffs, are what the British call a golden handshake of severance pay. And many of the people that I have recruited in government have had some form of golden handshake when they left their company. Normally it is always less than what they could get if they stayed, the so-called golden handcuffs.

Q. Is it your understanding that that was the case with Mr. Paisley?

A. Yes.

Q. Did he indicate to you at any time what the amount of the severance payment was that he did receive?

A. No, he did not. I have subsequently read it in the papers. But in fact, if anything, it seemed a bit low compared [172] to what he would have had to have given up.

Q. Thank you. You mentioned, Mr. Secretary, that other people that you have recruited for government service or perhaps others that you know about have received severance payments from their private employers before entering government service, is that correct?

A. That's correct.

Q. Have you ever noticed any indication in the performance of those government officials after they received the severance payment and they entered public service, that it interferes with their ability to serve the United States Government?

A. No, I have never seen that to be the case.

Q. Did you see any impact upon Mr. Paisley's performance from the fact that he received a severance payment?

A. No, absolutely not. In fact, I would say that he visibly bent over backwards to avoid any appearance of conflict of interest with any Boeing matters.

Q. Was there at least one occasion on which you directed him to participate in a Boeing related consideration because of his special expertise?

A. There were two or three cases where that was, where I had to have his input where he had not grabbed the issue, and I asked him to get involved because I needed his judgment in the cases, the procurement cases. [173] Q. Your judgment was that the interests of the United States required his participation at least in those Boeing matters?

A. Absolutely. I directed him in it because the research and development budget of the Navy Department has, all comes together in only one man, and only one man has the reins of all of the different programs. And particularly at budget time it is essential that he be involved in the merits or lack of them of particular R&D programs. And there is nobody below his level where, particularly since we have the two services, Marine and Navy, there is no Naval officer that knows the Marine

programs or Marine officer that knows the Naval programs.

So, I several times directed him to get involved to give me his recommendations.

Q. Thank you sir. I would like to turn now to Harold Kitson, Jr. Were you involved in the appointment of Mr. Kitson as Deputy Assistant Secretary of the Navy for C31?

A. I approved his choice. I did not recruit him.

Q. Did you know at the time that he was employed by the Boeing Company?

A. Yes.

Q. Did you have any knowledge or any assumption about whether Mr. Kitson might receive a severance payment from the Boeing Company?

A. I never addressed the issue directly. I assumed that [174] coming from that layer of management, he would get a golden handshake, but it never was an issue before me.

Q. You did not regard the possibility that Mr. Kitson might receive a severance payment as in any way interfering with his ability to serve the United States Government?

A. No, I did not.

Q. What was your understanding of Mr. Kitson's performance as Deputy Assistant Secretary of the Navy?

A. It was outstanding in every way.

Q. And Mr. Paisley continues to serve as one of your Assistant Secretaries, is that correct?

A. He does. He is soon to be starting his seventh year in the job.

Q. Would you say you are satisfied with his performance?

A. That would be a real understatement, yes.

Q. How, sir, would you characterize his service to the United States Government?

A. I think he has been the best Assistant Secretary for R&D that the Navy has ever had.

MR. LACOVARA: Thank you, sir. I have no further questions, and I appreciate your coming today.

CROSS-EXAMINATION

BY MR. CLARK:

Q. Good afternoon, Mr. Secretary. Do I understand from [175] your testimony that you actively had to persuade Secretary Paisley to join your team, as you characterize it?

A. Yes, sir.

Q. Had you known Mr. Paisley prior to the point that you decided to recruit him as your Assistant Secretary for Research and Development?

A. Yes. I had known him for about four years prior to my appointment to the job.

Q. Now, you testified that, if I am correct, that Mr. Paisley told you prior to the point he left Boeing that he might receive a severance payment from Boeing?

A. Yes. It was mentioned in passing. And, frankly, I assumed that that would be the case. Generally, as you know, there are, it is kind of a negotiation between the employer and the employee as to what, compared to what he could get if he stayed and what he would get if he left, where the line would be drawn.

Q. Did Mr. Paisley ever tell you, either prior to his appointment or subsequent, how his severance payment was computed?

A. No.

D. Did he ever tell you that he had submitted calculations to Boeing prior to his departure that compared his anticipated government salary with the benefits he would have received had he stayed on with Boeing?

[176] A. No.

Q. Now, you made reference in your testimony to other individuals who have gotten severance payments, is that correct?

A. Yes.

Q. Do you know how those other individuals' severance payments were computed?

A. Well, my impression is that each case is *sui generis*. I had two employees in my company that left to join the government, and I gave each of them a severance payment. And the negotiation was different, and in one case very simple and in another case very protracted, in each case how you calculate what it ought to be for those kind of senior level people.

And so, there is no set formula. It is a case of any way to approach it that might have some plausible approach. The cases that I am directly familiar with, each one was completely different.

Q. When you used the term severance payment in your testimony with regard to Mr. Lacovara's questioning, what do you mean by severance payment?

A. Well, severance payment I think can mean several things. In one case we calculated it on the amount of money that would be paid to a person not vested in a pension, because they hadn't stayed long enough, to what he would get without being vested. In other words, sometimes the person, the severance pay is based upon paying the money that he would get [177] if he were vested, even though he is not vested. One of my employees was two years short of vesting and would get nothing if he left. We made a payment equivalent to the vesting.

Q. Was this at the Abington?

A. Yes. And others are simply based on a lump sum bonus.

Q. So you would agree with me, wouldn't you, that the term severance payment is really a generic term, and each individual's severance payment can be looked upon about the way, can be characterized or evaluated only on the basis of how it is computed?

A. Well, there are so many different ways to compute—I guess the most common is, well, you get the equivalent of three months salary, six months salary, and some companies I have seen they have gotten two

years salary. Some it is linked to a kind of deferred pay out of what might be construed to be in the noncontributory part of the pension. I think there are probably as many different approaches to a formula of severance payment as there are severance payments.

Q. So, if I were to tell you that I received a severance payment, you wouldn't necessarily know what I was specifically making reference to?

A. No, I would have no idea other than it is reasonably presumed to be a payment over and above the earned salary that you got up until the time of termination.

Q. In reference to Mr. Kitson, did Mr. Kitson ever tell [178] you that he got a severance payment?

A. No, but Mr. Kitson dealt directly with Mr. Paisley. And while he was in meetings that I attended, rarely dealt directly with me.

Q. And so, it would be obvious for me to say that, it would be correct for me to say that Mr. Kitson never told you how a severance payment he received was computed?

A. That's right.

Q. Mr. Secretary, did you ever indicate to Mr. Paisley that even if he were not confirmed by the Senate in his current position, he would still join your staff in some capacity?

A. I don't really recall. It is quite possible that I did. We have a number of senior positions that are not Senate confirmation. And so, it is possible. I don't recall any such conversation. I very much wanted him as part of my team. So, if we speculated about what if we can't get Senate confirmation for whatever reason, would there be another job that would interest him, that is possible. I don't recall any because I went after him specifically for the R&D job, and that was the whole focus of my dealings with him from the start.

MR. CLARK: If I may have a moment, Your Honor.

Q. I take it you would agree with me that there are employees and even members of your team who have not received severance payments who have nonetheless discharged their responsibilities to the highest level of their ability?

[179] A. Yes.

MR. CLARK: That's all the questions I have.

THE COURT: Anything further?

MR. BENNETT: Very briefly.

BY MR. BENNETT:

Q. Mr. Secretary, my name is Robert Bennett, counsel for Boeing. Mr. Secretary, you executed a declaration which was filed in this case, and I would like to refer you to paragraph six of that. And for your convenience, I will read it to you. It says: In my experience, the receipt of a severance payment from his former employer does not in any way interfere with the ability of a public official to render fair-minded, loyal and dedicated public service. In fact, the availability of a severance payment may tip the scales in convincing a private sector employee to interrupt his career and to consider rendering public service.

Do you recollect saying that?

A. Yes, I do.

Q. And I take it you stand by that today as of the time you wrote it?

A. Yes. And the context of that is that for a few key management jobs, you require a proven record of executive success either in government or industry. But particularly in the acquisition of or dealing with industry, industry [180] experience in my judgment has been invaluable.

Well, for those kinds of jobs, not the senior and partially ceremonial jobs, but the 14, 16 hours a day, six days a week hands-on management jobs, we have found that the people that by far hit the ground running and really do work effectively are those in the middle of

their careers, not at the end of them, and not at the beginning of them, but with a long enough experience to know the pratfalls and the technicalities of contracting and so forth, have had the experience of managing large enterprises. And yet they are the very people that it is the hardest to grab away. They haven't vested their pensions usually, they haven't had a chance to take advantage of the stock options, and yet they have a standard of living with mortgage and kids in college and braces on teeth and so forth, that make, that frankly make it impossible to just go immediately from a six figure income to a government salary at one jump.

So, a severance payment is often the only way they can see to make that leap. And that's precisely why the companies don't tend to make it easy and have a set formula for what you will get when you leave because they don't want them, the good ones, they are the ones they want too, and they don't want to give them up. So, that's why there is no kind of set formula where you have, well, if you stay five years you will get so much as a golden handshake. There is a formula for if you stay [181] another five years, you will get these many stock options matured and so forth to keep them.

So, that's why I have found that it has been essential in many cases.

Q. Mr. Secretary, given that explanation, would you agree with me that a company such as the Boeing Company, a major defense contractor, wouldn't you agree with me that a company like that has an obligation to the national interest to from time to time loosen those handcuffs you referred to?

A. I think they do, yes. I think that all private citizens and private companies need to make it possible for us to get the best people, and not the culls that the companies are trying to get rid of, but the ones that they really want to hold on to because they are good.

MR. BENNETT: Thank you, Mr. Secretary.

MR. TREANOR: I have no questions, Your Honor.

THE COURT: All right. Thank you, you may step down.

NOTE: The witness stood down.

THE COURT: Why don't we take just a brief recess at this time.

NOTE: At this point a recess is taken; at the conclusion of which the case continues as follows:

THE COURT: Who is your last witness?

[182] MR. BENNETT: Your Honor, we were going to call Harold Kitson, who is the remaining individual defendant from our group, but in the interests of time we are willing to make an offer of proof that if called he would testify to the items that are in his declaration that have been submitted to this Court earlier this month, and to rest on those and the exhibits that we have offered and the proffer that he would testify about his severance payment and what he did and what he knew on the same terms that Mr. Paisley and Mr. Jones have testified to.

I wonder whether that process is agreeable to the Government.

MR. CLARK: It is, Your Honor, we agree.

THE COURT: All right, very well. With that stipulation, do you have any other evidence you want to present?

MR. LACOVARA: Just documents, Your Honor.

THE COURT: All right.

MR. LACOVARA: We have submitted to the Court a series of exhibits. I would offer, these are identified as exhibits of defendants Paisley, Reynolds, Kitson and Jones, numbers 1 through 8, 15 through 47, 57 through 59, 62 through 69, 79 through 128, 133 through 167.

THE COURT: Are there objections to any of those exhibits?

MR. CLARK: Your Honor, we have raised relevancy objections to some of those particular documents. Is the last [183] one 137?

MR. LACOVARA: 167.

MR. CLARK: Yes, we do have— 67 is the last one you are offering?

MR. LACOVARA: 167.

MR. CLARK: We have posted relevancy objections to those, Your Honor, and I guess you can assess—

THE COURT: What documents are they and why aren't they relevant?

MR. CLARK: If Mr. Lacovara could go through his list a bit slower so I can follow along, I can explain why. If you wish to do it that way—

THE COURT: No. He has introduced a batch of exhibits here. If you have got any objections to them, you are going to have to tell me in particularity what they are.

MR. CLARK: We have no objections with 1 to 8.

THE COURT: I just want to know what you have got objection to.

MR. CLARK: 1 to 8, no objection.

THE COURT: Do you have any objections to 15 to 47?

MR. CLARK: I am reading them, Your Honor, just a second, please. Other than we don't think that they are relevant to the issues in this case.

THE COURT: Why aren't they relevant?

MR. CLARK: Because, for example, they are memos [184] concerning things outside the time frame. For example, appointment for consultant.

THE COURT: Well, if general relevancy objections are the only objection you have, I am hearing this case without a jury, that will be overruled. I think I can determine what is relevant and what would not be. What about 57 and 59?

MR. CLARK: 57 and 59, Your Honor, I have no objections.

THE COURT: 62 to 69?

MR. CLARK: 62, we find the document illegible. 63 we have no objection. 64, relevancy. 65 to 68, no objections. 69, relevancy objection.

THE COURT: Well now, you made relevancy objections to two of them. Which two do you want to object to?

MR. CLARK: 69, Your Honor, and 64.

THE COURT: Why are they irrelevant?

MR. CLARK: Well, 69, for example, is a letter from Barry Goldwater to Caspar Weinberger.

MR. LACOVARA. Your Honor, I will withdraw 64 and 69.

THE COURT: Very well. So it is 62, 63, 65, 67 and 68. All right, 79 to 128?

MR. CLARK: 79, 80, no objections. 81 to 82, they appear to be incomplete documents.

THE COURT: Well, you object to them?

MR. CLARK: Yes. I am stating the basis for our [185] objection. 79 and 80, no objection. 81, 82, objected to on the basis of being incomplete documents. 83, no objection. 84—

THE COURT: Well, because they are incomplete documents, objection overruled. What else do you have objection to? It will be easier if you just tell me what you have got an objection to.

MR. CLARK: 84 through 94 we object to on the basis of relevancy.

THE COURT: Objection overruled.

MR. CLARK: 95 through 100 we have no objection, Your Honor. 101, the document is illegible. 102 to 105, we have no objection. 106 we object to on the basis of relevancy. These are all awards received by the individuals. And, of course, we have asserted that the performance that they conducted is—

THE COURT: Objection overruled. 79 to 128 is admitted. Have you any objection to any of them in 133 to 167?

MR. CLARK: 133, 134, 135, no objection. 136, relevancy. 137, objection on the basis of illegibility in the exhibit, Your Honor. 143 to 150 on the basis of relevancy, we object. 153, we object on the basis of an unexecuted document, the deposition apparently was unexecuted.

THE COURT: What deposition is 153?

MR. FENDRICH: It is the Government's 30(b)(6) designee.

[186] MR. LACOVARA: This is a witness produced by the Government, Your Honor, in response to a 30(b)(6) notice. I believe the witness has now signed the deposition.

MR. CLARK: If she has, then we withdraw that objection. And I think that's it, Your Honor. No other objections?

THE COURT: All right, objections to those exhibits are overruled, they are admitted. Any other documents to be admitted?

Mr. Treanor, do you have any additional documents that you want to introduce?

MR. TREANOR: Yes, if the Court please, these are previously listed as Crandon Exhibits 1, 3, 4, 5, and 6. I would note for the record that Exhibits 5 and 6, which are the affidavit of defendant Crandon, Exhibit 5 and Exhibit 6, his deposition, have previously been admitted by the Court when offered by the Government under their exhibit number. Exhibit 2, which is listed on the pretrial statement as Mr. Crandon's Department of Defense personnel file, we are withdrawing that. It was listed as an exhibit because we had not received it from the Government at the time of the pretrial conference. We have subsequently received it and believe it has nothing probative.

THE COURT: Very well. Any objection to 1, 3 and 4 of Crandon's exhibits?

MR. CLARK: No objection, Your Honor.

[187] THE COURT: Mr. Bennett, do you want to submit any exhibits? There are a lot of exhibits in this case.

MR. BENNETT: Yes, Your Honor. We would move in Exhibits 1 through 50.

THE COURT: Is there any objection to Exhibits 1 through 50?

MR. CLARK: Just a moment, Your Honor, 1 through 50? We object to 1 through 4 on the basis of relevancy.

THE COURT: Simply a general relevancy, or do you want to be more specific?

MR. CLARK: General relevancy, Your Honor.

THE COURT: All right, that is overruled.

MR. CLARK. Exhibits 7 through 17 on general relevancy.

THE COURT: It is overruled.

MR. CLARK: Exhibit 25, illegible handwriting, objection based on illegible handwriting. Also Exhibit 29, illegible handwriting. Exhibit 31, objection on the basis of being incomplete, no page 2 is attached to the exhibit.

32 and 33 general relevancy. 37 through 48, general relevancy. And Exhibit No. 50 we object to on the basis of being incomplete because it does not contain the requests, the defendants' requests, only gives the answers to their requests for admission. We would object on that basis.

THE COURT: Those general relevancy objections are overruled for the reasons previously stated. I have admitted [188] documents that have illegible handwriting from both sides, and I suppose if they are illegible, I can't do much with them.

MR. LACOVARA: Your Honor, we also have tendered exhibits, as Exhibits 168 through 200 a series of financial disclosure forms for other government officials which the Department of Justice produced to us through the discovery process. We believe those show the receipt of severance payments by a variety of other government officials and the amounts of those payments. And we would, with the Court's leave, offer those as well, subject I am sure to the Government's relevancy objection.

MR. CLARK: We have indeed a relevancy objection to those exhibits, Your Honor, but we have a objection on a more fundamental ground. All those exhibits appear

to be incomplete based upon our review of the appropriate files at the Office of Government Ethics. They are clearly irrelevant as well. None of these reports in any way relates to any of the defendants in this case, Caspar Weinberger, George Schultz, Lionel Olmer. I don't see any of the individual defendants. I see Donald Regan, I see John Knapp, Guy Fiske, Kenneth Davis. I don't see that they have any relevance whatsoever. There certainly has been no testimony adduced in defendants' case to establish relevancy whatsoever.

It is certainly not to burden the Court, so we object on those two grounds, incompleteness and lack of relevancy.

[189] THE COURT: I don't see what additional disclosures are going to add. There has been testimony here that it is standard industry policy, the last witness just testified to that. And that is uncontroverted.

So, I assume that you could go through the files and find a host of them that have severance pay in them. And there is no reason, it would seem, to have that cumulative kind of evidence, and what kind of probative value it would have to this specific case. And the objection is sustained.

All right, all the exhibits are in. Do you all desire to present any additional evidence, any rebuttal evidence?

MR. BENNETT: Your Honor, excuse me, I have one other point. I didn't realize— Your Honor, in light of my examination of some of the witnesses, I don't feel it is necessary to present any witnesses. But I did submit to the Court the excerpts of various depositions of Mr. Wilson, Mr. Hagberg, Mr. Hebeler, Mr. Little, and Mr. Miller, all of which support points which we feel have already been established by the evidence. And, Your Honor, I wouldn't dare stand here and ask you for permission to read these to you, but I would ask the Court to accept these in evidence in lieu of me calling them as witnesses. And I have no other evidence then, and this is sort of an exhibit.

THE COURT: What is the list of them again? Miller, Hebeler—

[190] MR. BENNETT: Your Honor, I have submitted to you a binder, and there are ten deposition segments.

THE COURT: All right. I have got two of them. Give me the other eight.

MR. BENNETT: Mr. Crandon, Mr. Hagberg, Mr. Hebeler, Mr. Jones, Mr. Kitson, Mr. Little, Mr. Miller, Mr. Paisley, Mr. Wilson, and there is one from the, deposition of the United States of America.

THE COURT: Very well. Any objection?

MR. CLARK: No, Your Honor, we did those same depositions.

THE COURT: That same list that you had?

MR. BENNETT: Your Honor, just to make it clear, it is perhaps a similar list, but I have actually included the excerpts which we are moving in evidence. We are not moving in the entire depositions. We have tried to reduce it to the essentials.

THE COURT: All right.

MR. BENNETT: With that, Your Honor, Boeing has nothing else.

THE COURT: Okay. Any rebuttal?

MR. CLARK: No, Your Honor.

THE COURT: All right. Any argument you want to make?

MR. CLARK: Yes, Your Honor. May it please the Court, I believe the facts here are very clear. I think the evidence [191] addueed by the Government has made those facts very clear to the Court. I just want to very briefly, very briefly summarize those facts.

It is clear from the evidence that each of the individual defendants knew that the Boeing Company would consider giving them a payment prior to the time that they would leave for federal employment. Mr. Paisley so testified. Mr. Jones, Government's Exhibit 125, at pages nine to ten, 13 to 14. Mr. Crandon, Government's Exhibit 128,

at pages 15 to 16. Mr. Kitson, Government's Exhibit 127, at 66 and pages 47 to 65.

Each individual defendant prior to leaving Boeing submitted financial data to the Boeing Company that undertook to demonstrate a disparity in their expected Boeing compensation should they remain at Boeing versus their anticipated benefits as a federal employee.

Mr. Paisley so testified. And I would direct the Court's attention to U.S. Exhibit 70 or 111 at 184. U.S. Exhibit 60 for Mr. Jones, his calculation sheet. U.S. Exhibit 90 for Mr. Kitson. And U.S. Exhibit 60 for Mr. Reynolds.

Your Honor has had an opportunity to review those sheets. I would ask in your further review that you look and see where anyplace in those computations that are offered there is any statement of past services rendered to the Boeing Company, any effort to explain why, based upon past services to [192] the Boeing Company, that individual felt that he was entitled to any type of payment.

Third. What did Boeing do with the data? We know the answer to that question in two ways, from testimony and from exhibits. From the testimony of Mr. Hagberg. We have again indicated in our deposition summary the particular pages that we are relying on. I think Mr. Hagberg's testimony is very, very crucial to this case. That is U.S. Exhibit 124, Your Honor. And Mr. Hagberg of course was the designated 30(b)(6) witness for the Boeing Company.

As to the exhibits, U.S. 42 shows the sheets that Boeing utilized in terms of calculating payments for Mr. Jones, Mr. Reynolds and Mr. Paisley. Now, they don't have the names on the pages, but we can tell from Mr. Hagberg's testimony, which is U.S. Exhibit 124, because at page 28 of U.S. 124 he identifies which sheet is Mr. Jones' sheet. At 111 he identifies which sheet is Mr. Reynolds' sheet. And at pages 88 and 92 to 94 of U.S. 124 he demonstrates or identifies which of those sheets is Mr. Paisley's.

I would also direct the Court's attention respectfully to U.S. Exhibit 43, which has the computation sheets for defendants Kitson and Crandon. And U.S. Exhibit 45, which was accepted into evidence, which has attached to it, Your Honor, a listing of all these payments. And I think it is very clear, as you read the list of payments, that they are all for people [193] who went into the federal government, and it all contains references to their salary.

What is interesting about these exhibits, U.S. 42 and U.S. 45, is if you look at the computation sheets, there is absolutely nothing about past contributions to the Boeing Company. It is all prospective, loss of salary projected ahead four years.

Mr. Paisley testified as to how he computed that or submitted that information. Forfeiture of company contributions prospectively. In other words, an amount to be paid equivalent just as if they continued to be Boeing employees. Relocation costs. Clearly prospective, not retrospective, not based upon past contributions to the company. High area supplement.

In terms of the alternative calculations that were performed in Exhibit 43, for defendants Kitson and Crandon, even that alternative calculation, and of course there are two calculations in each of those pages of U.S. 43, Your Honor, the Hagberg four step formula which I have just gone through, as well as the alternative formula, but even the alternative formula applies or uses a fraction that factors in anticipated years of government service.

So, we think it is very clear that in reviewing these exhibits, U.S. 42, 43 and 45, that it is very clear that there is absolutely nothing retrospective. The entire focus and [194] orientation of these documents is towards the government employment.

What do they look at? They look at anticipated goverment salary. They look at benefits they will lose as gov-

ernment employees. There is nothing retrospective. We think that is particularly specific and important.

THE COURT: Well, is the Government's position in this case that if someone leaves another's employ to go to work for the government, that the only severance pay that can be paid to that person is pay that is already earned?

MR. CLARK: Your Honor, I can't speak to all situations. I can only speak to this situation. This situation is so clear that what was calculated here was in this case very clearly tied to salary differential times years of anticipated federal employment, benefits that would be lost, relocation costs, that kind of thing. And that in that situation— That is the Government's position. I can't speculate. And Secretary Lehman talked about severance means whatever the details of that particular severance means. In this particular case we believe it violates the requirements of 209 and the common law.

THE COURT: Maybe I miss the point. But I don't perceive the issue to be all that clear-cut. This statute says that the salary cannot be supplemented. It doesn't say that there can't be severance pay. Am I correct about that?

[195] MR. CLARK: The statute talks about their cannot be an augmentation to compensation of a government employee in reference to his services as a government employee.

THE COURT: That's right. So, it doesn't say that you can't have severance pay.

MR. CLARK: It says you cannot have severance pay if the effect of the severance pay is to constitute a supplement to the compensation and that compensation supplement relates to the duties and responsibilities of the government employee. It does say that.

THE COURT: Well, what if these four people had left Boeing and instead of ever submitting a figure, Boe-

ing just out of the air says, we will give you 50, you 60, you 100, you 200 severance pay, you have been good employees with us in the past? Where does that fall in your theory as to what this statute applies to?

MR. CLARK: That seems to be a different case than this case, Your Honor.

THE COURT: It is.

MR. CLARK: Because in this case it is very clear that all the computations were based upon the differential between expected government compensation and what they would have earned at Boeing.

THE COURT: Then why aren't the percentages the same? Why is the amount of money that each one of them received [196] different than the amount that they presented?

MR. CLARK: I am not—

THE COURT: There is no relation with any of these people to the amount they said they would lose and what they got, is there?

MR. CLARK: What there is in the record, Your Honor, is the submission of data giving, to Boeing, the data needed to put into the Hagberg formula, which is a differential between anticipated government salary and anticipated benefits had they remained at Boeing. It is what Boeing did with that data. And the exhibits that we have made reference to 45 and 44, show exactly what they did with that data. They computed it projecting in the future to establish a differential.

I ask the Court, respectfully, what else is a supplement other than taking a base amount and adding something to it to bring it up to a prescribed amount? That is exactly what Boeing did here.

THE COURT: But just how you figured something doesn't make it that, does it? Just because they took the salary lost that was going to be had, that doesn't necessarily make it a supplement instead of a severance payment?

MR. CLARK: In the facts of this case I think it does, Your Honor, because they so closely tie to differential. We are talking here— Because I would direct the Court to these exhibits, Mr. Hagberg's computations. Differential times years [197] of anticipated employment, loss of VIP investment, loss of FSP investment times years anticipated government employment. Relocation costs, something accruing solely—

THE COURT: I understand that argument. And maybe you don't want to answer my question, or maybe you don't understand it. But suppose I find that that is the way they calculated it. But I find that they paid that before these people went on to government employment, and therefore it is severance pay. Where do you draw— Where do we draw the line? Do we get back to how you calculate severance pay, is that the standard?

MR. CLARK: Well, I think there are two responses to that, Your Honor. First of all, Congress amended the statute in '62 and specifically did away with any requirement that the payments be made to an individual while that individual is a government employee. And the evidence showed that the legislative history and the intent of Congress is not when you received the payment, it is when the employee enters into a fiduciary relationship, when the government employee begins to render service to the government. The money may have been paid to the employee before, but the possession was in the defendants before they began their employment with the government. That employment was based upon the government salary plus the money paid to them by Boeing over the equivalent they would have received over a three or four year service.

[198] THE COURT: You are contending that there is a fiduciary relationship before the employment ever starts?

MR. CLARK: No, I am not. I am saying that as soon as the employment begins, the fiduciary relationship begins. And that's the point at which this Court should

assess whether or not that duty has been breached by the fact that the salary has been, the compensation has been paid, the supplement has been paid.

It makes no difference whether or not the money is paid before. This is what is unique about conflict of interest statutes. It makes no difference whether or not the individual is paid before. It is the effect of the payment when he assumes his government employment. And the effect when these individual defendants assumed their government employment was that they received in effect a salary supplement provided to them by Boeing designed to bring up to an equivalency, taking their government salary, adding on an amount projected forward for three or four years, so that they would have a rough equivalency of financial benefits almost as if they had not left Boeing at all.

And in this case it is so clear from the computation sheets, it is so clear from the testimony, it is so clear from the exhibits precisely how the supplement was calculated and how the calculation was entirely prospective, looking forward towards a period of government employment. There is nothing in [199] these documents at all that says, we are going to give Mr. Paisley $180,000 because he did these five great things for the Boeing Company. Instead, the documents we see say—

THE COURT: Let me stop you right there, and maybe you will get to my question. Is the Government contending that you can only receive payments for work that has been done or monies that are previously owed? Is that what you are telling me?

MR. CLARK: If the payment is based upon a formula that rewards the employee for his past contributions to that company, that is a severance payment which appears to be a valid severance payment. But that's not the case we have here. Here it is all prospective based upon projecting the benefits they intended to receive as federal employees, and undertaking to compensate and supplement that compensation while they were federal

employees. That's the whole basis for it. It is an entirely different situation. And it is so different because the exhibits here show it to be different, and the testimony.

If I could just have a few more minutes, Your Honor. Let me just complete my review, because I do want to say a few things about the testimony offered by the defendants. I think it is pretty clear also from U.S. Exhibits 124, 122 and 123 that the recommendation computing by Mr. Hagberg utilizing the four factor prospective formula proceeded up the chain of command at Boeing. And I would direct the Court's attention to particularly U.S. 122 and U.S. 123 in which Mr. Hebeler and Mr. [200] Miller indicate that they accepted the recommendation, they knew what the recommendation was based on and they accepted that. It went up to Mr. Miller, U.S. Exhibit 121, he too was aware that there was a salary differential and these other prospective factors. Even when it got to Mr. Wilson, U.S. 120 at pages ten to 11, Mr. Wilson testified he knew this included the salary differential. He also knew that there was no evaluation of their past contributions to the Boeing Company attached to that recommendation. And that's at U.S. 120, page 8. He also knew that the payments were made with the purpose of, quote, to encourage them to view favorably their positions by moving to the federal government. And that is at U.S. Exhibit 120 at 55.

Now, we heard testimony on behalf of the defendants. I want to say just a few words about that. In reference to Mr. Jones' testimony. Very clearly, submitted information to Boeing about current salary, he projected what his losses would be in the future if he went to the government, what he anticipated his government compensation would be. He talked about making disclosures to Dr. DeLauer. But he never disclosed to Dr. DeLauer how those payments were computed. He says he didn't know so he couldn't tell Dr. DeLauer. But the bottom line was, he didn't tell Dr. DeLauer the very thing that Dr. De-

Lauer would need to know whether or not the payments were acceptable or permissible or not.

[201] In any regard, Dr. DeLauer was not the designated official who could grant a waiver of a potential conflict of interest situation. And as Mr. Jones answered in response to Mr. Jones' question, there is no document in which it was ever presented, yes, the duty authorized, ethics official said, we understand that you have explained to us how this payment was made, how it was computed, and we find no problem. And we have cited the *Kenealy* and the other cases in our briefs that indicates there is a three step process that you have to grow through to get a waiver. And that was not done by Mr. Jones.

In terms of Secretary Lehman, he again testified that relative to Mr. Paisley, relative to Mr. Kitson, Mr. Kitson I didn't even know about a severance payment. Relevant to, in terms of Secretary Paisley, he knew he had gotten a severance payment, but he didn't know how it was computed. He himself said when he used severance payment, he really was not able to differentiate what he meant by that term, but each salary payment, each severance payment had to be evaluated on its own particular facts, and he didn't know what the facts were relative to Mr. Paisley.

In talking about his own company, the Abington Company, I was struck by the fact that Secretary Lehman talked about we looked at the past salary of our employee who was leaving and we based severance payment on his past salary. Secretary Lehman didn't say we looked ahead at the salary that we [202] anticipated he was going to get and that's the basis upon which we made the computation.

Now, in terms of the relevant law here. This is a point I alluded to earlier when Your Honor directed some questions when we first started this trial. I think the most significant point in assessing the cause of action brought forward by the Government is that we are dealing with a conflict of interest statute. I made this argument already to Your Honor, I am not going to repeat it, but it is a different kind of thing than 201, the bribery statute, or other statutes in the 18 200 series. Those statutes seek to deal with people who have acted improperly either through bribery or corruption or they have done something they shouldn't have done.

Section 209(a) is prospective application. It seeks to avoid an individual getting into a position of difficulty. And they have quoted the language out of *Mississippi Valley*, even the most well-meaning person can find himself in a position where there is a potential for there being a severe risk to the integrity of the government. Congress has made the determination, Your Honor, by passing 209, that that situation must be prevented before it can develop into where it has to be dealt with, for example, by bribery or some other statute. That's what 209(a) seeks to accomplish.

And that's why we have objected so vigorously to the introduction of evidence about was it secret, was there a [203] disclosure, what was the intent. The intent here is clear from the documents and the testimony. The individual defendants submitted calculation sheets with data. Boeing used that data in their computations. The result was payments which were prospective in application. That's all the intent that is necessary under a conflict of interest statute, and we have established that through our testimony.

The result of the defendants receiving the salary supplements is that they have placed themselves in a position where they have breached that preventive, prophylactic standard. It is designed to avoid them getting into situations for even the most well-meaning. This is what the Supreme Court has said in *Mississippi Valley*. I don't think in my opinion that the language of the statute could be any clearer as to what duty it seeks to impose upon both payer and payee.

Look how the payments were calculated. They are calculated clearly as a supplement to the government com-

pensation. Only to those in the federal government. Those going into the federal government were the sole recipients of these severance payments. We heard testimony as to that. The result of the payments was one of equivalency.

Now, Your Honor has asked several times, are the payments compensation, do they relate to the services as an officer as 209 requires. I think, here again, the factual evidence is overwhelming in establishing that. The whole basis [204] of the computation is the period of government service. It is very clear that it relates to his period of services as an officer of the United States.

Now, defendant, some of the defendants have cited the *Muntain* decision in their briefs. And I think that *Muntain* very clearly shows why the theory that the Government has rested its case upon, Your Honor, is in fact accurate and correct. *Muntain* was the case in which the individual and his wife, the government employee, went off to Ireland and the individual was reimbursed for his travel expenses, his wife's travel expenses, and was prosecuted criminally under the statute. And the Court in reviewing that chain of events found that that was not a violation of 209.

There are a number of reasons which I think indicate the situation that we have here which was not present in *Muntain*. For example, it was a trip reimbursement in *Muntain*. It was not tied to the Mr. Muntain's salary at all. In this case the payments are very clearly tied to the amount of salary the individual defendant would receive as a government employee.

Furthermore, in *Muntain* the Court said he went off to Ireland essentially to introduce some people to sell insurance to other people. It had nothing to do with his responsibilities as a government employee. By contrast here—In fact, in *Muntain* he was on leave at the time that he was in Ireland. By contrast here, the payments are tied directly to [205] the compensation he was expecting as a government employee. And very clearly, the

payments were designed to cover the entire period during which these individual defendants were rendering services to the government. I don't think *Muntain* is valuable in any way other than to reaffirm the Government's legal theory.

There are other aspects of their legal theory which we have addressed in our brief, and I don't want to spend a lot of time on them. The point Your Honor has raised about if they are not government employees, does that mean that if the payment is made to them when they are not government employees, does that foreclose the operation of the statute. We briefed that thoroughly. I direct the Court respectfully to our trial brief. It is very clear, the legislative history in 1962 was designed to expand the reach, to make the time of the payment irrelevant. The critical thing is two things must happen. There must be a payment, compensation, and the person must go to work for the federal Government. And those situations are both true here.

I have already talked about intent. I have also talked about the fact that there was not, as *Kenealy* requires, a three step disclosure. I think that is very important here, Your Honor, because you have heard quite a lot of testimony today about the fact that this was disclosed to various people at the Department of Defense or in the Department of the Navy. [206] Conflict of interest statutes, because of the complexity, because of the difficulty of enforcement, designated officials only are required or allowed to sign off and to authorize or resolve apparent conflict of interest situations. The first step. And none of the individuals that the defendants say they talked to was the designated official authorized to so act.

Secondly, they didn't, and all the defendants have testified either at depositions or here today, none of those defendants told anybody how the severance payments were constituted. They said they didn't know. Whatever the reason, they never set down and said, I received a sever-

ance payment that was based upon these four factors. Therefore, they didn't make full disclosure.

And defendants, for all of the documents that they have introduced, do not have a single document that says Mr. Paisley, Mr. Kitson, Mr. Reynolds, or any of the other defendants, you have discussed this potential conflict of interest situation with the appropriate official, I have determined that this conflict is not one that presents a threat to the United States.

Let me say just a few things about statute of limitations because I know Your Honor has raised some questions about that this morning. The action or the appropriate standard against which to measure the statute of limitations against the individual defendants is 28 U.S.C. 2415(a), not (b), [207] but (a). It is a contract implied in law. We have cited the *Jankowitz* decision from the Court of Claims of a contract implied in law. Therefore, the action is not a tort action. A formal agency relationship, agent relationship begins at the time one begins to render service. That's when services are rendered, that's when the contractual relationship arises.

As to Boeing, I don't think— I think Boeing doesn't dispute and argue in fact that section 2415(b) does apply to them, and the Government doesn't dispute that. The dispute seems to be as to when that statute of limitations should begin to run. Your Honor heard testimony from Mr. Heyel this morning that the report that went to the principal administrative contracting officer was dated March 26, 1982. And he was unaware of any situation in which a report that carried a face date ever reached the principal administrative contracting officer any date earlier than the face date. In fact, he said usually it was at least several days after that based upon his experience.

2416(c) is an argument that has been made that somehow there has to be fraudulent concealment. That is just something that has been read into the statute by defendants. We have briefed that. I don't want to remake that

argument, but I wanted to direct the Court's attention to the language of 2416(c), to the official, quote, charged with the responsibility to act in the circumstances. The defendants [208] have ignored this language. They say, well, you know, you knew something about it, somebody knew something about it in the government at some point in time, and that is just as good. 2416(c), the language is very clear, the official charged with the responsibility to act in the circumstances.

The only person charged with the ability to act in the circumstances in terms of referral for investigation or prosecution was the principal administrative contracting officer. He received the report, based upon the face of the report, Mr. Heyel's testimony, March 26, 1982. The report to the contracting officer was but the distillation of a long series of inquiry by the DCAA. Fraudulent concealment, whenever he gets it, fraudulent concealment is the reason. If he hasn't gotten it, 2416(c) establishes when the statute of limitations begins to run.

In conclusion, Your Honor, I cannot think of a case which is more archetypical of the exact evil that Congress determined should not be allowed to develop other than to 209. I think evil is probably too strong a term. I should probably say the exact potential 209 seeks to prohibit.

The computations, everything is prospective. We have talked about this. I don't think there is anything that could be—In talking about a specific case, Your Honor, specific case where you have in front of yourself the materials submitted by the individual defendants, you have in front of [209] yourself the documents that show how Boeing computed it and exactly how it was all based upon prospective equivalency of compensation. That's the case that is before the Court. This is the case we think 209 and the common law were designed to foreclose this kind of action.

THE COURT: What propensity for evil exists in a situation where somebody has left a company completely,

terminated their employment? Isn't the thrust of 209 to say that somebody can't supplement somebody's salary on a monthly or a yearly basis so that that person is beholden to whoever is supplementing his salary? That is the purpose of it, so that you are not beholden to somebody that supplements your salary because if you know you don't do what they ask you to do, you won't get the next supplement. What did any of these defendants here have to gain by doing anything for Boeing? They had their money, they ought to be more independent than otherwise because they have some financial means to live, shouldn't they? They are not beholden to anybody.

MR. CLARK: Your Honor, you and I can speculate back and forth, but I think that question was resolved by Congress. And Congress said that we cannot afford to take the risk that any type of payments which supplement compensation, whether or not they are paid before, after, or during, or whenever, Congress has made the determination in 209 that that risk shall not be allowed—

[210] THE COURT: But that mixes apples and oranges. What Congress says if somebody supplements a salary, then that is wrong and that exposes you to evil. I am coming to the other direction. Where in this whole case is there evidence that there is a supplementation of income that is going to bind anybody to do anything? These people aren't bound to do anything. They are not beholden to anybody.

MR. CLARK: The statute as defined by Congress and passed by Congress doesn't require that, Your Honor. We submit that it requires only the establishment of an intent through how the payments were calculated to supplement the salary. That's all Congress required to be demonstrated because of the very complex nature of conflict of interest statutes.

Someone is in the Defense Department—

THE COURT: Well, the purpose of conflict of interest statutes though, if we are going to get back to arguing that, where is the potential for any conflict of interest in this whole situation?

MR. CLARK: As I said, Your Honor, you and I can sit and speculate and discuss—

THE COURT: I don't want to listen to what Congress did. Where is it in this case?

MR. CLARK: There is a potential.

THE COURT: Of course Congress when they draft laws talks about the intent to stop conflict of interest. And of [211] course the purpose was to stop payments. But, you know, your argument is, you are trying to expand, it seems to me, supplementation. By your theory of the case, as I would normally understand supplementation, you are trying to say that a payment, even before you start to work, is a supplementation of the salary. And then you want to piggyback that on the possible conflicts that can come about. What possible conflicts can come about here?

You know, don't back off into the general again. I have got you up in the specific, now stay in the specific. Tell me the conflicts that can come from a person receiving termination pay, whatever you want to call it, terminates the employment, is not beholden to them at all. What possible conflicts can develop?

MR. CLARK: Your Honor, as I said again, and I will repeat it, we can spin out all sorts of scenarios. That question has been resolved by the statute.

THE COURT: All right.

MR. CLARK: Thank you.

MR. BENNETT: Your Honor, very briefly. Your Honor, first of all, whenever you have asked counsel for the Government a fact question, they go back and say, well, you know, Congress has spoken. And it just is not the case. If you look at the *Muntain* case, which they seem to rely on, it makes it absolutely clear. There you had a government employee. [212] You don't even have a government employee here. There you had a government employee. And the Court said, for there to be a violation of 209, however, the contribution must have been received as compensation for services, and those

services must have been rendered as an employee of the United States. It says Section 209 of Title 18 prohibits an officer or employee of the executive branch or independent agency, et cetera, from getting a supplementation.

So, they don't even get over hurdle one. The statute is just simply not applicable in this case.

They suggest that 209 covers everybody. Not true. If you look at that section of the United States Code out of which 209 comes, look at 18 U.S.C. 201, which is bribery, for example, there the Congress made it clear that they wanted to cover people who were not simply employees of the United States Government. And so, they said, at 18 U.S.C. 201, to induce such public official or such a person who has been selected to be a public official.

So, it is very clear that 209 is not even as broad as 201.

All of the cases that they rely on are simply inapplicable to this case. The *Mississippi Valley* case, which they cite like it is *Marbury v. Madison* or something, is a case where a fellow negotiated a deal at a time that he was representing First Boston, the private lender, and at the same [213] time he was a consultant to the United States Government. The *Continental* case, the *Kearns* case, these are kickback bribery cases, most of which involved convictions of government officials for taking, for being on the take. That is what those cases are all about.

So, he doesn't answer your fact questions. And he says, well, Congress has spoken. And the answer is, Congress hasn't spoken. They have got—If they are so concerned about 18 U.S.C. 209, and therefore this Court is supposed to expand the terms of the clear meaning of the language, then why hasn't the Department of Justice ever prosecuted a severance pay case? Or why hasn't the Department of Justice never before in the 70 year history of this statute ever filed a civil action based on

the allegations as are here in this complaint? And the answer is simple. They want you to do their job for them.

If the United States Government says that you can't have any severance payments, the Boeing Company won't make any severance payments. And if the United States Department of Justice says, you can give severance payments but you can't have any prospective factors, then we will give severance payments without any prospective factors.

But that is the way it should be done. It should be done by Congress. Or it should be done by regulation. Or it should be done by the Department of Defense officials who say, Mr. Paisley, Mr. Jones, we found out how they calculated it, [214] they are prospective factors, you can't accept it. But to ask this Court to come in and find that my client has made illegal payments, has induced a breach of fiduciary duty, and to find that these citizens, Mr. Jones and Mr. Paisley, who are still—Mr. Paisley is still the Assistant Secretary of the Navy, and Mr. Lehman said the finest one he has ever had or heard of, for these people to get branded because the Government wants to start making some law and think that you are going to play that game with them is pretty outrageous.

Getting to the facts, which they don't want to talk about. These people were not government officials at the time. They have elevated form over substance in this case. When the Attorney General of the United States of America, William French Smith, got a $50,000 severance payment, having only been on a board of directors for six years, the United States Department of Justice said that, well, you know, even though there were some objective criteria, that there was no real intent to compensate him or supplement his future income. What is sauce for the goose is sauce for the gander.

Every witness in this case, and if you look at the testimony which we have introduced in evidence and the

testimony you have heard today, every single person says there was no intention to supplement income, there was no intention to supplement salary.

Now, their whole case—What their case really is, I [215] think I finally figured it out by the end of the trial, they are saying that if you make a severance payment that has any kind of a prospective factor in it, in the calculation, no matter how low in the bowels of a company that emerges from, that that is an irrebuttable presumption, and you take this little forward looking statistic or figure and you leap from there into a violation of the statute. Well, you know, that is obviously preposterous.

If you look at Mr. Hagberg's deposition, and he was the 30(b)(6) person, he testified that even though those were the, there were calculations looking towards prospective, he very clearly said it wasn't intended to supplement. And he even made the following statement. This is on page 147, which is in evidence. Is it a fair statement to say that you would not have any personal knowledge as to which of the calculations or which of the work-up documents Mr. Wilson would have reviewed in making that decision? Is that a fair statement? Yes, that's a fair statement.

He goes on to testify that as to all these financial data, calculations or whatever, they were done in industrial relations, and he doesn't really know to what extent they figured in the calculations. It was just a mechanism by which you pick up a number.

If when he said to Mr. Paisley or Mr. Jones or Mr. Kitson, you know, you guys have been fantastic and done [216] brillant jobs, we will give you 5,000 or 10,000 a year for your past services and multiply that by the number of years, why we would have severance payments that go through the roof in this particular case, I do believe the Government would leave us alone then. As they left Mr. William French Smith alone. He was there six years on a board of directors. And he got an average of $8,000 a year.

So, Mr. Paisley was with Boeing 28 years. Let's multiply—I mean, it is silly, Your Honor, but that's what their case is. Their case is a silly, silly case, because they are taking form and they are elevating it way over substance.

And the most critical question you asked them, which they don't answer, is this. Of course a severance payment is above and beyond what is the narrow view of past services. The typical way you pay somebody for past services is you give them a salary, you give them an income. The way you paid Mr. William French Smith for his past services of being on the board of directors of the Jorgensen Steel Company was to pay him his director fees. Mr. William French Smith was lucky, they gave one of his other directors a gold watch when he left and they gave Mr. William French Smith $50,000.

But the point is, and I believe it is true here as it was in that case, there was no intent at all to violate the law, there was no intent to supplement income.

So, Your Honor, I think that the evidence is [217] absolutely undisputed in this case that the purpose and the intent of these people was at all times very, very honorable.

And I think the final point I would make is I would ask you to look at the portion of our summary judgment motion which is before you, and appropriately reviewed since it is a pleading in the case, on the statute of limitations. You will recall, Your Honor, that these payments were way back in '81 and early '82. And the Government has clearly announced today that this is a tort case. There is a three year statute of limitations. So, in terms of the tort action, they are way beyond the statute. Even though there was a subsequent tolling agreement, that tolling agreement didn't take place until March 25. And you will recall the witness from the Government testified that while on March 26 there was a nice little report that was put in a box with a ribbon around it and sent to somebody, all of that knowledge

and information was well known to the government. And we identify that. And we identify exhibits on pages I believe 53 and 54 of our motion for summary judgment. And if you recall, Your Honor, on the argument of that motion I provided the Court with the specific exhibits which establishes beyond question that the statute of limitations bars at least three, clearly three of the payments in this case.

I don't really want to get off on the statute limitations argument. This statute doesn't apply here. And [218] even if it did, I don't see how this Court could find that there was any violation at all.

If the United States Government does not want Boeing to assist people in going into public service, then all they have got to do is they have got to tell us. But all the Exhibits 1 through 50 that we have had introduced, the words coming out of the mouths of the civil division lawyers are not the words that have come out in writing from various United States Government officials.

So, I would respectfully submit that we are entitled to judgment in this case.

MR. LACOVARA: Your Honor, this is a case about unethical behavior. That is the gravamen of a conflict of interest charge. I submit to you that what you have heard suggests that the only thing that smells about this whole affair is the bringing of the case, not the underlying conduct of the men that I represent.

The facts are really clear now. The Government makes a lot--And I said at the outset of the trial this morning I thought this was an accounting case. After listening to the examination or cross-examination and Government counsel's closing argument, that appears to be all it is. The entirety of their theory is that what separates the permissible from the unethical is how a severance payment is calculated. They have tried to back and fill. In response to Your Honor's question [219] with respect to how this case is substantively different from any of the thousands of severance payments that they acknowl-

edge, and I think that the Court recognizes, that have been made to people who are taking time out of their career to render government service.

The key fact here that they want to ignore is that each of these men got a severance payment for one reason only. He was a Boeing employee. Boeing wasn't making severance payments to government officials because it likes the way they did their work. They only made severance payments to their own employees who might be taking a leave or resigning from the company or retiring from the company to render public service.

So, the core predicate for these payments was past services. In the case of Mr. Paisley, 26 years or 28 years. Mr. Jones, 26 years. Mr. Kitson, 14 years. These were men who had extensive service with this company.

Now, counsel argues, well, they never totaled up in the documents how many years of service they rendered. Where did you see in the documents that you had to consider all these years of service? Why do they think these people were getting these large severance payments? Because they had shown themselves by the levels that they had reached in the company to have been outstanding corporate employees. And the company anticipated that they would be able to render extraordinary public service if they left the company if, as Secretary Lehman [220] put it, the golden handcuffs were released. Or, as Mr. Jones put it, the disincentives that the company built in to keep its valued employees from going to competitors were relaxed so they could accept the government's inducements to come to work to render public service. That's the core of this case.

Now, they say, well, these men supplied information to Boeing that allowed Boeing to consider prospective salary differentials. As if there is anything in the law that makes that illegal. We want to emphasize, Your Honor, that even if that were entirely true, that wouldn't make the severance payments here illegal. But it is not true. As you heard these two of these men

testify, Mr. Jones and Mr. Paisley, and it is true for the others, the documents that they prepared, or in Mr. Paisley's case he had his wife prepared, were designed to analyze the overall financial impact on them of leaving Boeing at that stage in their careers. They considered every conceivable kind of factor. Many of them were wholly retrospective. The loss in value of what they have already achieved by working for years for the Boeing Company. And they said to Boeing, this is what is going to happen to me if I leave now.

They had no idea, as they testified, and as the Boeing witnesses testified, how Boeing actually figured the severance payments. It is irrelevant how Boeing did, Your Honor, but they didn't know and indeed didn't care. That wasn't their [221] concern.

So, when you get to the question of what the facts show, you have men who, according to the testimony, to the stipulations, rendered extraordinary service to the government, undivided loyalty, no conflict of interest. Whenever there was any possibility of a problem, they consulted with private counsel or Defense Department counsel. They got the green light on all of these things. They disclosed the information on the forms in the way the government asked for it. There is testimony in the depositions that the government never asked or suggested that severance payments had to be separately broken out on these forms.

Turn then to the law. The Government seems to have two theories. It is still not clear to me which of them they are alleging against my clients. They have talked about a breach of a fiduciary duty of loyalty. I regard that as a tort. If it is a tort, it is barred by the three year statute of limitations. The Government doesn't disagree.

There is some other kind of theory that they are suggesting, that an implied contract arose or that there ought to be a constructive trust imposed on this money. We have cited the Virginia law, which I think would

be the only applicable law on constructive trust, because at the time these payments were made these men were Boeing employees. They had no contractual relationship with the United States, no [222] assurance that they were going to be appointed by the United States.

The 30(b)(6) witness who has testified here, as designated by the Government, Miss Johnson, went through the elaborate detail of showing that at the time each of these men received a severance payment he had not even a right to receive the right of the offer of government employment, nonetheless he was considered a government employee.

The Government has also stipulated that at the time these payments were made, these men had no contractual right to public employment, they had no contractual right to any benefits from the United States, including salary.

It is preposterous, Your Honor, to talk about a contractual obligation between these men and the United States Government when they received their severance payments when the government very clearly disclaims having any kind of contractual relationship with them.

So, the Government, faced with that, again backs and fills and says, all right, there was no real contractual obligation when they received the payments, but later on, even though they may have been lawful when they were received, the payments somehow became unlawful when they actually did receive government appointments and enter on duty, at that time some contractual obligation arose.

Your Honor, that seems to me to be a rather striking [223] proposition of law. There are no cases cited for it. And I am not aware of any that anybody could cite or even imaginatively invent. So, we come down to Section 209, the Government's statute here. This is what makes this case so particularly outrageous. This statute goes back at least to the turn of the century. It was recodified in 1962. As my brother Mr. Bennett has mentioned, never has the Government proceeded under this

statute either in a criminal case or a civil case to challenge the propriety of the severance payment, regardless of how calculated. The first case.

The Government says, forget about intent, what these men knew or what they didn't know. What counts here is that Boeing, unbeknownst to them, in part may have considered prospective factors.

Now, that isn't even true with respect to Mr. Kitson because the payments made to Mr. Kitson were somewhere between a factor, a calculation that included prospective factors and one that included his years of service with Boeing. But put that aside.

Your Honor has put his finger on the key issue here under the statute. Were these payments understood to be, and I read the statute, a contribution to or supplementation of salary. But it doesn't stop there, as the Government counsel would have you believe, as compensation for his service as an officer or employee of the United States. There is not a word [224] of testimony, not a line in a document, to support the notion that even Boeing intended that. Much less is there any evidence that that's what these men understood was the purpose of the payment; that is, that it was a contribution to their salary or compensation for providing services to the United States.

The Government counsel says, well, look at the statute, look at the way it is written. Mr. Bennett has pointed out that Congress knew very well how to distinguish incumbent government employees from prospective government employees. It did that in the bribery statute.

This statute is titled salary of government officials and employees payable only by the United States. It applies, as Your Honor I think has discerned, only to the kind of problem that you identified. And it is larded through the legislative history of the 1962 recodification. What Congress is worried about, this is quoted in our papers, was the temptation, the impropriety, perhaps the injustice when a government employee is carried on a

private employer's payroll and is being paid by that private employer for what he is doing for the government. Then he is serving two masters.

These men weren't serving two masters when they got their severance payments. And they weren't serving two masters when they were in the Defense Department. They had severed their connections with Boeing. They were serving, as Secretary [225] Lehman testified, only the people of the United States.

Now the Government says, well, if you look at it as a master of calculation, you can say that because it had some forward looking factors in it, because of the way that Boeing at some levels in the company did some of the calculation for some of the defendants, then you ought to treat it as a salary supplement and compensation for government employment.

I suggest, Your Honor, that if that's what this statute means, the line from Dickens, Mr. Bumble's line, that if the law assumes that, the law is an ass, would be applicable here. Congress would have to have been, if you will forgive me, an ass to think that the method of calculation of a severance payment paid to a departing corporate employee was the same thing as having an incumbent government employee on a private payroll. Obviously it isn't. The Court recognizes that. That's not what this case is all about.

The Government counsel says, finally on this point, Congress amended the statute in 1962 to make it applicable to prospective government employees, not just to incumbent employees. That is simply false, Your Honor. There is not a single word in the 1962 legislative history that indicates that there was such an intent. The earlier statute specifically said that it applied only to incumbent government employees.

Counsel relies on a law review article written by a member of the New York City Bar that had urged a certain set of [226] changes. But nowhere in the explanation of what Congress did did Congress suggest that

it was changing the fundamental scope of this statute, which had always applied and was always understood as applying only to having a private benefactor carrying a government employee on its payroll. That's not what this case is about. When Congress explained the limited wording changes that it was making, it said only that it was narrowing a statute that might be too broad.

So, Your Honor, I think there can't be much question that what was done here, far from being unethical or improper, complied with all of the laws, all of the governing standards, and all of the traditions of public service that these men have so decently and honorably rendered to the United States. And we ask for judgment dismissing the claims against them.

MR. TREANOR: If the Court please. I intend to be brief because I will rely on the, what I hope, persuasive arguments of Mr. Bennett and Mr. Lacovara. I do feel, however, compelled to invite the Court's attention to several aspects of the evidence as it relates to my client, Mr. Crandon, that may differ from the broad brush approach taken by the Government in this case. Indeed, one of the reasons that Mr. Crandon has separate counsel is that the evidence with regard to his receipt of a payment by the Boeing Company differs in several points.

First of all, it should be noted that Mr. Crandon, [227] like his fellow former Boeing employees, was recruited into the federal government by the federal government. He was hired as a computer scientist by the Department of Defense and has since the beginning of his tour with the federal government been employed as such by the North Atlantic Treaty Organization in Brussels.

I would make the point again that I made in opening statement to the Court, that Mr. Crandon continues to enjoy the confidence of the Department of Defense, has been promoted, has been commended, and has had his tour of duty extended twice while under investigation

by the United States for a breach of a fiduciary duty and/or a conflict of interest.

I suggest to the Court that the actions of the government with regard to Mr. Crandon speaks much louder than the theory, the novel theory brought before Your Honor today.

I would also respectfully invite the Court's attention to pages 42 through 44 of Mr. Crandon's deposition, which is in evidence, in which Mr. Crandon clearly states a fact not disputed by the Government except in theory. And that is that he did not accept compensation from Boeing for the services to be performed or rendered as a government employee. Indeed, the evidence is undisputed that at no time did Mr. Crandon know the basis upon which Boeing paid $40,000 to him on a day prior to his departure from Boeing.

I suggest to the Court, respectfully, that the [228] argument of Government counsel in which he says that the sole or one of the sole bases of determining the amount of severance payment is the salary differential, ignores what the evidence is with regard to my client, Mr. Crandon. Because if the Court please, one of the methods that has been testified to by Boeing officials that was used did not in any manner consider a salary differential between what Mr. Crandon made from Boeing and what he was to make with the federal government.

In any event, and regardless of what methods of calculation were used, it is undisputed that that method of calculation was unknown to Mr. Crandon. And indeed, the amount of money that he was paid by Boeing differed, first, from Mr. Crandon's estimate of his monetary loss, and it also differed from the two formulas which the evidence establishes were used by Boeing to come up with a figure.

It seems to me, if the Court please, that it is inherently unfair for the Court to accept the theory of the Government and render a judgment against an employee of the government, a present employee of the government, based

upon a breach of fiduciary duty and a conflict of interest when the facts have been laid out as they are today.

One point that I would like to make is regarding whether or not Mr. Crandon informed the government of his severance payment. On two occasions Mr. Clark has stood before the Court today and said that he believes that those [229] disclosures are irrelevant vis-a-vis Messrs. Paisley and Jones. And yet when you review the summary of the Crandon deposition which has been prepared by the Government and to which we took exception, you will see that in that the Government has alleged that Mr. Crandon did not disclose to anyone the fact that he had received a severance payment from Boeing.

And we think it is symbolic of the basic unfairness of this case that that summary submitted to the Court, and I suspect that line left in there because of the negative inference that the Court is asked to draw from it, should in fairness have pointed out that as a GS scheduled employee Mr. Crandon was under no obligation and indeed there was no format for him to report the receipt of a severance payment.

If the Court please, I respectfully suggest that the action against Mr. Crandon based upon a breach of contract or breach of a contract in law, as Mr. Clark stated this morning, if it is such, and if Virginia law applies, as we suggest respectfully that it does, then the statute of limitations applying to nonwritten contracts in Virginia, that the three years should be applied here.

THE COURT: Do you think a breach of contract has been alleged in the complaint?

MR. TREANOR: I suggest, if the Court please, it is difficult to tell. But we say that the, all of the evidence submitted to the Court today by the Government establishes a [230] breach of fiduciary duty, which is a tort, and which is governed by the statute of limitations. And I suggest that whatever they call it, if it is a contract dispute, as Mr. Clark repeated I think somewhat reluctantly several times this morning, if we are talking

about a contract in law, I submit respectfully that the three year Virginia statute as applied to unwritten contracts applies here, and that this matter ought to be dismissed.

If, on the other hand, if this is a tort, as the evidence would seem to submit, and as the argument of Mr. Clark seems to seek to establish, then clearly the three year tort applies.

And furthermore, at the time that the payment was received by my client, he owed no duty whatsoever to the government. He had not begun his government employment at the time of receipt of the payment.

For those reasons I would respectfully ask the Court to render a judgment in our favor.

THE COURT: Do you have any response?

MR. CLARK: Very brief, Your Honor. This matter has been briefed and argued extensively. First of all, reference to William French Smith. There is absolutely no intent that was demonstrated in that case because the payment was very clearly based upon his past service as a member of the board of trustees, or the board of directors.

[231] Cases such as a *Gerdel* and *Martel*, which we have cited in our briefs, say that any type of supplement, whether it be salary, moving expense, anything, cost of living, anything that supplements or adds to a government employee's salary violates the strictures of Section 209.

The defendants seem to ignore the fact—And Mr. Lacovara talks about the fact that on these forms that were submitted to Boeing by the individual defendants, they had things relating to their vested benefits. The Government has never disputed that. They got a separate payment for their vested payments. That is not the payment that is at issue here. What is at issue here is the prospective payment of severance pay.

Intent. Repeatedly the defendants say the Government says intent is not important, ignore intent. That is not

what we say. We say that in conflict of interest statutes, as the Supreme Court has said, *Mississippi Valley*, intent is demonstrated by actions, it is an objective standard. The Government's exhibits that show how Boeing calculated these severance payments and the materials submitted by the individual defendants, that demonstrates the intent, all the intent that is necessary under 209.

It is governed by federal common law. It is not governed by Virginia law. Perhaps we should argue the supremacy clause under *Jankowitz*. It is federal common law, it [232] is implied. *Jankowitz* discusses the theory.

In short, Your Honor, we think, we request respectfully that the Court sustain the Government's complaint and return a judgment for the Government.

THE COURT: Do you agree with Mr. Treanor that Virginia law governs if you have alleged a contract, or not?

MR. CLARK: Most certainly not. Federal common law governs.

THE COURT: There is federal contract common law?

MR. CLARK: Yes, Your Honor. We cited *Jankowitz* for that proposition, and we have also cited—

THE COURT: What about the tort?

MR. CLARK: I am sorry?

THE COURT: What about the tort? Breach of fiduciary duty, what law governs that?

MR. CLARK: The tort that has been alleged against the Boeing Company?

THE COURT: Yes.

MR. CLARK: That is governed by 2416(c). As to the statute of limitations, when the appropriate contracting officer or official in a position to act upon the information got word of it, that's when the report of March 26 went to the administrative contracting officer, that's when the statute began to run.

THE COURT: You don't think Virginia law has anything [233] to do with this tort either?

MR. CLARK: No, Your Honor.

THE COURT: All right. I will take a look at these exhibits which I have not looked at, and I will try to get you all a decision as promptly as I can.

MR. BENNETT: Thank you, Your Honor.

MR. CLARK: Thank you, Your Honor.

THE COURT: If we have no further business, we will recess until tomorrow morning at 10 o'clock.

HEARING CONCLUDED

GOV. EX. 7

May 1, 1981

To: C. E. Skeen

cc: R. R. Albrecht
S. M. Little

Subject: Termination Agreement Between The Boeing Company and Thomas K. Jones

Negotiations are being conducted between the Department of Defense and Thomas K. Jones to employ him on a 4 year (approximate) assignment as Deputy Undersecretary to DDR&E—Strategic and Space Systems. This assignment would be in the Senior Executive Service. Boeing management has encouraged Mr. Jones to accept this assignment.

The Department of Defense has taken the position, and I agree, that Mr. Jones cannot accept the proposed assignment unless he completely severs his connection with The Boeing Company. Accordingly, he will resign effective in early May, 1981.

We recognize the importance to the Government of having outstanding individuals in key positions, therefore, we have encouraged Mr. Jones to accept this assignment. In this regard, Mr. Jones' wife, Allene K. (Cormier) Jones, is employed by Boeing Computer Services Company as Manager of Information/Office Systems Development. Under most circumstances, Mrs. Jones could transfer to BCS in Vienna, Virginia, avoiding any need for her to interrupt her Boeing employment. Because Mr. Jones' responsibilities in government will include procurement decisions, however, it is prudent to avoid any appearance of conflict of interest. For this reason, it is both in The Company's and Mr. Jones' interest that Mrs. Jones not work for The Boeing Company during the period of her husband's government service.

A separate request is being submitted to grant Mrs. Allene K. (Cormier) Jones a long term Leave of Absence (LOA) to accompany her spouse to Washington, D.C., thus protecting many of her Boeing benefits. However, because this leave has a negative impact on her potential retirement benefits, we are recommending restoration of continuous service credit on the Retirement Plan for the period of the leave for Mrs. Jones upon her return.

The Company should consider the following items if and when Mr. Jones returns to The Boeing Company.

1. Payment of relocation costs, under the provisions of Corporate Policy 9G3 for the return to Boeing, with appropriate deviations as necessary.
2. Recommend to the Retirement Committee the restoration of continuous service credit under the Retirement Plan to include the period of his absence from The Company for government service.
3. Restoration of unreserved sick leave remaining in his account at the time of termination.
4. Mr. Jones would be immediately eligible for participation in the Voluntary Investment Plan upon reinstatement.
5. Reinstatement of his original vacation eligibility date and Company service date. Upon reinstatement, credit to his vacation account a pro-rata share of the hours he would have received based on the number of days from his last anniversary date to the date of termination. On his next anniversary date, credit a pro-rata share of hours based on the number of days from the date of his return to the active payroll to that anniversary date. Effective with each anniversary date thereafter, credit his account with a normal vacation award.

6. Recommend to the Compensation Committee of the Board of Directors a Stock Option Award to Mr. T. K. Jones to replace the number of non-exercisable shares lost at termination, to include stick split(s) that occurred during the period of absence.

As a result of his termination to accept this DOD assignment, Mr. Jones will experience severe financial penalties, which make some form of severance pay appropriate. We have assessed this situation, and these costs are itemized on the attachment. They include base salary difference, forfeiture of Company contributions, relocation differential and high cost area supplement. (No severance is proposed to cover his wife's financial impacts.)

I propose that we offer Mr. Jones a lump sum severance payment in the amount of $132,000, payable on termination. Mr. Jones has assessed his potential loss as well. His assessment includes those on the attachment, plus payoff of non-exercisable stock options (11.0K), closing and move-in costs on home purchase in Washington, D.C. (10.0K), higher interest costs on mortgage (6.5K) and an estimated cost of equivalent life insurance (2.0K), amounting to $29,500 additional cost.

I consider our proposed termination package will serve the interests of The Company and would be fair and reasonable to the employee. This is our judgment of what it will take to make this happen.

/s/ H. K. Hebeler
H. K. HEBELER

Attachment

Concurrence:

_____
C. E. SKEEN

_____
R. R. ALBRECHT

_____
S. M. LITTLE

GOV. EX. 9

May 1, 1981

To: Clyde Skeen

Subject: Termination Agreement—T. K. Jones

The attached termination agreement on T. K. Jones includes the items I think are appropriate for consideration when determining the severance payment.

The dollar amount I'm recommending is a very large number. Previous BAC managers that have taken government positions have been given severance/termination payments in varying amounts, such as Hua Lin $20,000 in 1975, J. A. Blaylock $11,000 in 1975, and Ben Plymale $26,000 in 1968. (T. K. is going to the same job that Ben held from 1968 to 1971.) The criteria and method used in determining the above amounts is the same as we're using for T. K. The large dollar payment for T. K., however, is due to T. K.'s salary losses as his Boeing base rate is significantly higher than his government salary, the forfeiture of benefit plans amounts and the high rate of inflation in the last five years.

The other side of the coin, however, is the potential benefit to Boeing of having T. K. return when this assignment is completed. The experience he will gain can only be of great use and worth to us. His increased knowledge of our product lines, the operating methods of government and the growth in stature and management technique after four years in the job will be of value to us on his return to Boeing.

In the broader sense, and taking into account the potential worth to Boeing on his return, I'm encouraging you to add your concurrence to the attached and forward to Stan Little for approval coordination. Needless to say, having someone with his views will be helpful to us *while* he is in Washington, D.C.

/s/ Bud
BUD HEBELER

GOV. EX. 17

To: C. E. Skeen

cc: R. R. Albrecht
S. M. Little

Subject: Termination Agreement Between The Boeing Company and Herbert A. Reynolds

Negotiations are being conducted between the Department of Defense and Herbert A. Reynolds to employ him on a four-year (approximate) assignment working for the Deputy Undersecretary of Defense (policy). This assignment would be in the Senior Executive Service. Boeing management has encouraged Mr. Reynolds to accept this assignment.

The Department of Defense has taken the position, and I agree, that Mr. Reynolds cannot accept the proposed assignment unless he completely severs his connection with The Boeing Company. Accordingly, he will resign during July 1981. Mr. Reynolds has indicated his desire to return to The Boeing Company upon completion of this government assignment.

The Company should consider the following items if and when Mr. Reynolds returns to The Boeing Company:

1. Payment of relocation costs, under the provisions of Corporate Policy 9G3 for the return to Boeing, with appropriate deviations as necessary.
2. Recommend to the Retirement Committee the restoration of continuous service credit under the Retirement Plan to include the period of his absence from The Company for government service.
3. Restoration of unreserved sick leave remaining in his account at the time of termination.
4. Mr. Reynolds would be immediately eligible for participation in the Voluntary Investment Plan upon reinstatement.

5. Reinstatement of his original vacation eligibility date and Company service date. Upon reinstatement, credit to his vacation account a pro-rata share of the hours he would have received based on the number of days from his last anniversary date to the date of termination. On his next anniversary date, credit a pro-rata share of hours based on the number of days from the date of his return to the active payroll to that anniversary date. Effective with each anniversary date thereafter, credit his account with a normal vacation award.

As a result of his termination to accept this DOD assignment, Mr. Reynolds will experience severe financial penalties, which make some form of severance pay appropriate. Mr. Reynolds has assessed this situation, and we have itemized these costs on the attachment as submitted to us by Mr. Reynolds. They include base salary difference, forfeiture of a portion of military retirement, forfeiture of Company contributions, cost of equivalent insurance coverage, high cost area impact on housing and taxes, and relocation costs.

I consider an appropriate termination package will serve the interests of The Boeing Company and would be fair and reasonable to the employee. I recommend you consider $80,000 as a reasonable sum for severance to Mr. Reynolds considering appropriately items I, III and IV of this attachment.

/s/ H. K. Hebeler
H. K. HEBELER

Attachment

Concurrence:

_____
C. E. SKEEN

_____
R. R. ALBRECHT

_____
S. M. LITTLE

GOV. EX. 28

June 17, 1982

To: D. P. Beighle, E. H. Boullioun, H. W. Haynes, K. F. Holtby, W. M. Maulden, C. E. Skeen, M. T. Stamper, R. W. Tharrington

Subject: Terminal Pay for Selected Employees Entering Government Service

The attached writing has been developed in response to T. A. Wilson's request for an operating procedure addressing the problem of determining the appropriate amount of terminal pay, if any, associated with selected employees accepting high level positions within government. He has asked that the Executive Council review and comment on the procedure. I will be contacting each of you in the near future to obtain your reaction.

/s/ S. M. Little
S. M. LITTLE

Attachment

INTERNAL OPERATING PROCEDURE

Subject: Terminal Pay Associated with Acceptance of Government Positions

PURPOSE

To provide a uniform method of calculating terminal pay for certain employees who accept Government positions.

SCOPE

This internal operating procedure will apply to employees who would suffer substantial loss in salary and/or benefits by accepting Government employment and who are approved for participation by the Chief Executive Officer.

PROCEDURE

Recommendations for participation in the Terminal Pay Plan will be initiated by operating organization heads and routed through appropriate management including the Vice President—Industrial and Public Relations and Vice President—Contracts and Legal Counsel for approval by the Chief Executive Officer. Terminal pay will be computed by Corporate Industrial Relations through the application of two alternate calculations shown below. The results of the alternate calculations, organization recommendations and the particular circumstances involved will be evaluated for appropriateness and a recommendation will be submitted to the Chief Executive Officer for final review and approval.

ALTERNATE I

A. LOSS OF SALARY

Boeing base salary plus Incentive Compensation pay, if applicable, based on a "normal award", minus Government salary times the duration*.

B. FORFEITURE OF COMPANY CONTRIBUTIONS TO ViP/FSP

FSP—40 hours of base pay per year times the duration*. Base pay to be escalated annually based on estimated annual salary increase. (Currently using 8% per year.)

VIP—One-half of employee contribution times the duration*. Base pay to be escalated in the same fashion as FSP.

C. RELOCATION COSTS

Estimated difference of Government reimbursement for household goods shipment and actual cost.

D. HIGH COST AREA SUPPLEMENT

Differential between Seattle and Washington, D.C. costs based on BLS data. Percentage applied must be equal to that which we are then paying to Boeing employees (currently 10%). Government salary times high living cost percentage times the duration*.

ALTERNATE II

This alternative is designed to provide 5% of current salary, plus normal incentive, if applicable, for each year of credited service, providing the expected duration of Government employment is four years. For durations less than four years, the value will be proportionately reduced.

FORMULA:

$$\text{Term Pay} = \frac{5\% \times (\text{salary} + \text{"normal incentive"}) \times \text{years of service} \times \text{duration}^*}{4}$$

*Duration will be based either on the number of years, or fractions thereof, of anticipated Government employment (normally the remainder of the Presidential term), or the number of years, or fraction thereof, to age 65, whichever is less. In no case will the duration exceed four years.

PART OF GOV. EX. 114

BOEING LIMITED

January 25, 1982

To: C. E. Skeen

Subject: Termination Payment—L. H. Crandon

The attached recommendation is being forwarded for your review and concurrence. Mr. Crandon will surely be an asset to Boeing in the NATO arena.

I support the recommended $40,000 payment, but based on a somewhat different approach. Our understanding is that T's rule is to utiilze the *lesser* of the detailed analysis and the "tenure" formula. I believe that recognition should be given to the foreign aspects of this assignment because the Company has given better benefits and allowances for employees taking Company overseas assignments. However, on a judgment basis, I believe the $40,000 is about the right number, hence the discount shown.

	Payment Approval	
	TAW Formula	Previous Formula
For a domestic assignment (per attached)	19,300	40,200 [1]
Foreign assignment addition (per attached)	42,400 [2]	42,200 [2]
	61,500	82,400
Discount—	21,500	
	40,000	

[1] Applicable items only (no high cost city allowance or relocation differences)

[2] Differences in allowances paid by The Boeing Company and not paid by the Government.

/s/ H. K. Hebeler
H. K. HEBELER

Concurrence: _____
C. E. SKEEN

GOV. EX. 120

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION UPON ORAL EXAMINATION
OF T.A. WILSON

November 7, 1986

9:15 A.M.

7755 Marginal Way South

Seattle, WA

• • • •

[4] EXAMINATION

BY MR. TERLEP:

Q Would you please state your full name?
A Thornton Arnold Wilson.
Q Where do you reside sir?
A 126 Southwest 171st, Seattle.
Q Do you have an association with the Boeing Company at the present time?
A Yes, I'm the Chairman.
Q Are you a Director of the company?
[5] A. Yes.
Q Are you also an officer of the company?
A Yes.

Q Are you the chief executive officer of the company?
A No.
Q Who is the chief executive officer?
A Frank Schrontz.
Q How long have you been in your current position with the Boeing Company?
A Since April of this year.
Q Prior to that time, what position did you hold with the Boeing Company?
A I was Chairman and chief executive officer since 1972.
Q How long have you been employed by the Boeing Company?
A I was originally employed in 1943 and I left the company for almost two years. And came back to the company in 1948.
Q And you've been employed since 1948 with the Boeing Company?
A Continuously,
A Yes.
[6] Q In your duties since 1972, have you had an occasion to become familiar with any policy or practice at the Boeing Company with regard to severance payments?
A I'm the person that they usually check with to finally, and I recognize that we have a procedure of trying to evaluate how much we would give somebody on a severance payment.
Q Did you establish this policy or practice?
A No.
Q Do you know who did?
A No.
Q Do you know how long Boeing has been making severance payments for employees?
A No.
Q Would you define Boeing's activities in paying severance payments to individual as a policy or as a practice of the company?
A I would say it's a practice.

Q Is there anything in writing that defines the practice?
A I think probably Mr. Little would be a better one to answer that question because my dealings have been with him and I'm sure that he has some memoranda or something that would indicate [7] whatever we had.
Q Are you aware of any document that would embody the policy or practice on severance payments?
A The only, I think on maybe one occasion that I recall, namely Paisley, I probably looked at a sheet where they had done some calculations on it.
Q But I'm talking about a document that may lay out policy or practice as a policy document or something describing a policy?
A I know of none.
Q Did you delegate your responsibility with regard to the approval of severance payments to Mr. Little?
A No.
Q What is your role in approving severance payments?
A They usually come to me at the end in a very informal way. But Mr. Little or maybe even someone in his office that works it and works it with the organizations that are involved. But he would come to me.
I don't know that he comes to me on every one, but my guess is he probably does. But at least he feels very comfortable with the— [8] anyone that he does not come to me with, he feels very comfortable that it's one that would be well within proper scope and doesn't bother to bring it to me, if he doesn't.
Q Are you aware of the lawsuit that is pending against the Boeing Company?
A.
A Yes.
Q That lawsuit involves the Boeing Company and five individuals, Melvyn Paisley, T.K. Jones, Herbert Reynolds, Harold Kitson Jr. And Lawrence Crandon.
Do you know those individuals?
A I know Paisley, Jones and Kitson.

To the best of my knowledge, I don't know the other two gentlemen. When I say that it's quite possible I've met them, but I do not put any face and I don't remember what job they had in the Boeing Company or anything of that nature.

Q You do know that all of them were employed by the Boeing Company?

A I have been told that.

Q But with regard to the three that you do know, you do know for certain that they were employed [9] by the Boeing Company?

A No question about it.

Q Can you describe the Boeing severance payment practice as you know it today?

A I think the Boeing Company is very interested in seeing good people in government positions. And I think we try to encourage our people to, if they're, if they have an opportunity to serve the country in that manner to do so, and incidently, I think our competitors or the other people in the industry, do the same thing or it's my impression, and I think that is a good practice, because government needs some people from industry to help in the jobs that they have.

Q But can you describe how the practice works at the Boeing Company?

A If a young man or woman is, wants to go into government or has been approached by somebody, we would encourage him to go and in some cases the government will approach someone like myself or somebody else in the company and encourage us to make people available, even identify them and then subsequently make them available.

Q But how does that relate to the payment of severance payments?

[10] A The payment is just something that we think in a lot of cases it's a hardship on the person making the change and it's just something to make the, take any onerous aspect out of it or to some extent to take any

onerous aspect out of it or apprehension that they might have from the financial standpoint at the front end.

Q You mean when they start government employment?

A Yes.

Q What hardships are you referring to?

A I think in the first place when you change jobs there is uncertainty, and because you don't, certainly there is no—although we have brought many of these people back into the company, there is no guarantee that we would. Nor is there any guarantee on their part that they would come back.

So there is some uncertainty associated with that. There is moving expenses, incidentals of that sort, and then there is quite often the job they're going into pays less than the one that they have at the Boeing Company and the potential.

So there are a lot of aspects of it. They might have a better idea what their [11] advancement would be at Boeing than they would elsewhere.

Q Does the calculation of the amount of severance payment that an individual receives take into account the difference between his Boeing salary and what his government salary will be?

A I think that is one of the considerations that is given. From my standpoint, I review the end number and in general I don't think that it should be as high as some of the times it's been recommended to me, particularly in the case of Mr. Paisley.

And so I don't look at it that way. But I think that is one of the factors that is taken into account, sure it is.

Q Is that salary differential multiplied by a particular number of years that the employee is expected to be employed by the government?

A Well, I don't know. I would suppose if somebody was going in at the end of an administration like right now, you would assume he was not going to be there more than a couple of years, depending on where the position is.

Although I don't know on that. I think that is, it's not considered a one-year [12] proposition necessarily.

Q But is it tied to the amount of years remaining in the Presidential term?

A Not necessarily. Not that I know of.

Q Who is eligible to receive severance payments?

A I think anybody is eligible to receive them. But that damn well doesn't mean that anybody gets them.

Q For instance, are they applicable, do you grant severance payments to individuals leaving the Boeing Company to go to work for a competitor?

A No.

Q Do you grant severance payments to those going to a college or university or some other academic institution?

A We have done, I would assume that we might. I don't know that, I'm not aware of any specifics.

I am aware of cases where we have have paid a man his salary at Boeing while he taught at Stanford for instance, or we paid him three quarters of his salary and Stanford picked up the rest of it and he taught a year at Stanford.

He was available for consultation and things during that period, but—

Q Did he return to the Boeing Company?

[13] A He never, he was on leave of absence, he never resigned from the company.

Q Do you remember this individual's name?

A Ed Wells.

And I would be surprised if we haven't done that for others.

Q The payments that you make to individuals such as Mr. Wells, do you consider those payments severance payments?

A No.

Q They are salaried payments while they're on a leave of absence?

A Yes.

Q You would consider it a payment different than the ones that are made to the five individuals that are involved in this case?

A Yes.

MR. SHARP: I object to your question. He already said that Mr. Wells did not sever. So to ask him if it's a severance payment seems to be kind of nonsensical.

MR. TERLEP: I'm trying to understand what Mr. Wilson's idea of a severance payment is, and I think we know that it's not the type of payment that was made to Mr. Wells.

[14] MR. SHARP: Mr. Wilson has told you that a severance payment is to encourage government service, and in encouraging someone to teach in an academic institution, they did not have to sever, it was on a leave of absence.

BY MR. TERLEP:

Q Mr. Wilson, is it Boeing's policy or practice to make severance payments only to individuals who are entering government service?

A I'm not—I have trouble, we encourage people to go into government service and I'm not aware of anywhere we made, if you limit it to the, just the term severance per se, I'm not aware that we have made severance payments to people, other than the ones that have gone into the Federal government. But there might be other cases that I'm just not aware of.

But for instance, at the state level, if a man is elected to the State Legislature, we have a so-called part time State Legislature, then the Boeing Company continues to pay him his salary and then any salary he gets from the State Legislature he gives back to the Boeing Company.

So there are, and I don't see there is a heck of a lot of difference.

[15] Q You don't ask for a government employee's salary for instance, of the five individuals here, to be paid back to the Boeing Company?

A No. No, that would not be possible in the Federal Government.

Q The payments that—I'm not trying to characterize your testimony, I'm just trying to understand the payments that might be made to a state or local government official, would be similar to those made to Mr. Wells, they would be either on a leave of absence or some other situation severing their employment with the Boeing Company?

A If they go to the State Government, I don't know, there may be a case on that. I'm not aware of any.

Q You're not aware of any the practice has ever applied to?

A No.

Q Is the practice limited to certain agencies within the United States Government?

A Not particularly, not that I'm aware of.

Obviously, most of the requests and most of the cases have been with the Department of Defense, but I think there have been other [16] cases where people have gone into other departments.

Q If one of your employees wanted to go to work for the Department of Agriculture for instance, would that person qualify for a payment under your severance practice?

A May well, may well.

Q Does it depend upon the position that an individual is taking with the government whether or not you pay a severance payment?

A No.

Q Does it depend upon the factor of whether or not his government salary is less than he's making at Boeing or more than he's making at Boeing?

A I think this is one of the factors that is taken into account. And obviously if a guy left Boeing, went to the government at a higher salary than he was making here, I don't think we would be inclined to give a severance payment.

Q Why not?

A There is no hardship on him, it's a promotion.

Q Do you know who Jerry Calhoun is?

A No. I'm not saying I haven't met the gentleman, but it means nothing to me.

MR. SHARP: In a way that is an unfair [17] question to a Chairman who would like to know everyone.

MR. TERLEP: I realize Mr. Wilson's position. I just had to get on the record whether or not you knew Mr. Calhoun.

A To the best of my knowledge, I do not know him.

BY MR. TERLEP:

Q How many employees does the Boeing Company have, do you know?

A One hundred eighteen thousand.

Q You don't know them all?

A No, I don't know them all.

And that one hundred eighteen may not be absolutely accurate, but it's in that right order.

Q Is there a formula that is used to compute severance payments?

MR. SHARP: Do you mean is he familiar with the formula or does he know if one exists?

BY MR. TERLEP:

Q Do you know if one exists?

A I think that they have a set of Rules that they work at. I'm familar with this mainly because of the Paisley case, when brought it to me I [18] thought it was too damn much and I said—so they tried to show me how they arrived at it and I said well, go back and come up with some other system that arrives at some number less.

I'm aware that they have some criteria they look at when they try to evaluate how much we're going to pay these various people.

Q Do you recall what documents were presented to you in connection with Mr. Paisley's severance payment?

A There were no documents as such. Mr. Little had some papers with him and if you've taken his deposition, I'm sure you have gone into that. But he had maybe one sheet of paper that he showed me at the time.

Q Do you recall what was on that sheet of paper?

A I only recall the general order of magnitude of the bottom number.

Q Was it a memorandum with paragraphs or a sheet with calculations on it?

A It was a sheet with numbers on it and then a bottom number of a couple hundred thousand dollars or something.

Q Did you ever learn of any requests that Mr. Paisley had made for an amount of severance [19] payment?

A I know Paisley pretty well, I would be surprised if he didn't ask for about ten times as much. But I'm not, but on the other hand, I'm not personally aware that he asked for anything.

Q You didn't see any document or paper that he submitted to the Boeing Company?

A No.

Q Itemizing what he would want the Boeing Company to consider?

A No,. I did not.

Q Do you recall being presently involved in the approval process of severance payments for any individual, other than Mr. Paisley?

A Well, Mr. Little comes to me and says, we're going to give Joe Blow thirty thousand dollars or something, and it's consistent with our past practices and so forth and he thinks it's all right, and do I have any problem with it and I'd say no, that is okay.

And he does that, to the best of my knowledge, he's done it on practically every severance payment deal since I have been the chief executive officer.

Q Does he ask you to sign anything?

[20] A To the best of my knowledge, he never has.

Q Do you recall signing anything with regard to any severance payment?

A No, I do not recall ever signing anything.

Q Mr. Little is the next person in line down the ladder from you in the approval process for severance payments, is that correct?

A Mr. Little reported most of that time to Mr. Stamper, but I work directly with Little on this subject. And I think Stamper probably either was not in the loop or he only was when I was not available.

Q Going down the ladder of approval, if you know, who also was involved?

MR. SHARP: Are you talking about hierarchical, subordinate/superior relationships?

MR. TERLEP: Yes.

BY MR. TERLEP:

Q If you were to start with you as the last person to approve it and go down to the various persons who would approve it in the chain coming to you, can you list those people in ascending order?

A I think, it gets disbursed when you get to Little's level and I think his comments on this would be much more informative than mine.

[21] I'm sure I would want to know that whoever in effect is the head of the military organization or whatever organization this guy is coming from, if he's coming from the commercial organization, that that person, whoever heads that organization at that time, and these have changed over the seventeen years that I was CEO.

So there has to be some agreement between those kinds, that kind of people, whatever organization he's coming out of.

Q Do you know if, do you know what position Mr. Albrecht occupied in the Boeing Company in the years 1981 and 1982?

A Albrecht was our, I hired him—he was our chief counsel and was, came into the company as chief counsel.

Q Do you know if he had a role in the approval of severance payments on any of these individuals that was other than as a lawyer for the Boeing Company?

In other words, as a manager of the Boeing Company, rather than as a lawyer?

MR. SHARP: Do you mean did Mr. Albrecht at this time function in a non-legal role with respect to severance payments?

[22] MR. TERLEP: That was the gist of my question.

MR. SHARP: If he knows.

A No.

One of you tell me what you want me to answer.

BY MR. TERLEP:

Q What I'm trying to find out is whether Mr. Albrecht acted in any other than a legal advisor capacity in connection with these severance payments?

A Not to the best of my knowledge.

Q If the employees, if one of these employees left the Boeing Company, one of the five that were involved here, and they had received a severance payment from the Boeing Company, and after the time that they left the Boeing Company and before they started work for the government they found that the government job was not going to be open to them, would the Boeing Company have hired them back?

A I don't know. I think you would have to look at each one as a special case. I would assume if we had encouraged a man to take a job and then [23] something that comes up through no fault of his he doesn't get that job, I would assume we would take him back, surely.

Q Would you ask for the severance payment back?

A He wouldn't have to give it to us back. I don't think we'd—hell, that's just equity.

I think the guy, I think he would have given it back for God's sake if he never left the company.

I don't understand that question.

Q Was a condition for his retention of that severance payment his taking a government job?

A That would certainly be our understanding going in. But if then he doesn't get the government job and he goes to work for a competitor, we wouldn't get the money back, wouldn't expect to.

Q But if he came back to Boeing, you would get the money back?

A If he came back immediately I would expect to get it back.

MR. SHARP: Your question assumes that he never took another job?

MR. TERLEP: Yes.

MR. SHARP: That he never left Boeing?

BY MR. TERLEP:

[24] Q I assumes that is what Mr. Wilson means by immediate, that he didn't take another job—

A Yeah, if he went back and cooled his heels for a year through no fault of his own waiting for the other job to materialize, then I would suspect we would let him keep it.

He could keep it if he wants to under any circumstances, it's his once he's severed from us.

Q If you know, when these individuals left the Boeing Company to go to work for the government, did the Boeing Company fully expect them to be employed by the government?

A Yes.

Q Did you have any communications with anybody inside of the United States Government with regard to the severance payments made to these individuals?

A No.

MR. SHARP: That question asks Mr. Wilson personally if he had?

MR. TERLEP: Yes.

BY MR. TERLEP:

Q Let me rephrase the question in another way.

During the time that these individuals [25] were leaving from, I think the first was in May of '81 through the time Mr. Crandon, I think he was the last one who left, you didn't have any conversations with anybody in the government at that time?

A No, to the best of my—I don't recall any conversations on that subject with any of them. I've talked with Lehman about Paisley going to work for him. But I have not, we did not discuss severance payments.

Q When was that discussion?

A Before, when he was considering Paisley for the job. Now he knew Paisley, not as well as I do, but he knew Paisley, so he didn't need a hell of an a lot of input from me and he was very anxious to get him.

Q What was the gist of your conversations with Mr. Lehman?

A To the extent that Paisley was not a person that we had recommended for the job or something like that, Paisley was a person that they had asked for, and I think—I think Melvin even asked me to give him a favorable recommendation.

Q Did you do that with Mr. Lehman?

A Yes, qualified, but favorable.

[26] Q How was it qualified?

A Well—

MR. SHARP: Is this really relevant?

A If it's not relevant, I'd just as soon like not to say. It has nothing to do with the severance payment,

Q Did you encourage Mr. Lehman to hire Mr. Paisley?

A No.

Q Did you tell him not to hire Mr. Paisley?

A No.

Q Are you familiar with whether or not the formula used for the computation of severance payments of these individuals included a factor for the amount that the

employee would lose in company contributions, future company contributions?

MR. SHARP: I object to that. Why don't you ask him if he's familiar with the formula, then you can get into the specifics.

MR. TERLEP: I asked him if he was familiar with the formula about ten minutes ago.

A On that subject, I'm not familiar with if the formula has something in it or if there is a formula and it has something in it. I'm not familiar with that element there.

BY MR. TERLEP:

[27] Q I didn't finish the question.

Do you know if there is a formula?

A I'm an engineer and a formula, you get one answer, unique.

Let's take Paisley's case. We had several answers that I know of and we have changed a lot of them. So whatever, if there is a formula it's not very rigorous.

So I think it's a technique to try to get in the ballpark and try to get some consistency from year to year, from person to person.

But—does that answer your question?

Q Pardon my imprecise use of the word formula. I'm not an engineer and to me a formula is probably something different than it is to you.

Let me ask it this way. Do you know if there was a factor considered by the Boeing Company in determining the amount of severance payment to be made to the five individuals involved that had to do with Boeing contributions to the Voluntary Investment Program.

MR. SHARP: Did Mr. Wilson consider such a factor?

MR. TERLEP: I asked him whether he [28] knew.

MR. SHARP: If someone used a factor?

MR. TERLEP: Yes.

A I don't know. I certainly can't say. I don't know that they didn't, nor can I say that I know they did.

BY MR. TERLEP:

Q Do you know whether the computation of the amount of severance payment included a high cost area supplement for the Washington, D.C. area?

A I'm not aware of that. It's pretty high cost out here.

Q Washington, D.C. area, not Seattle.

Do you know whether the severance payments that were made to any of the five individuals were included on any overhead accounts of any of the Boeing companies?

A I don't know how the accounting was done. I'm quite positive it was done in an appropriate way, but I have no idea how they did it.

Q Is it your current recollection that you don't know?

Have you ever known how they were accounted for?

A No. If I knew that I would know I knew. So it's [29] not one of these things that I'm saying to the best of my knowledge I don't know, I'm telling you I don't know.

Q You never directed anybody to charge them in any particular way?

A No.

Q To any account?

A No.

Q Did you advise any of the employees to disqualify themselves from Boeing business after they started work for the government?

MR. SHARP: I object. You haven't established whether he's even spoken to any of these gentlemen.

He said he never met two of them.

What exactly, can you break it down a little bit?

MR. TERLEP: Individually?

MR. SHARP: Fine.

BY MR. TERLEP:

Q Did you advise Mr. Paisley to disqualify himself?

MR. SHARP: Did he speak to Mr. Paisley?

MR. TERLEP: He's already testified that he spoke to Mr. Paisley.

[30] MR. SHARP: I don't think he has. I think he testified that he knows Mr. Paisley. Your question assumes things to which Mr. Wilson has not testified. I object to it on that ground.

BY MR. TERLEP:

Q Did you speak to any of the employees that are involved in this case around the time that they were departing the Boeing Company for government employment?

MR. SHARP: In connection with the severance payment?

MR. TERLEP: No, at all.

A To the best of my knowledge I don't recall any specific deal. And thinking back, it would not be inconceivable that I would have said something to Paisley, but I don't recall having said anything to him.

I wouldn't have said anything to T.K. Jones because I wouldn't have any concern whatsoever, he's such a straight character that—but more specifically, I just think that the general atmosphere out here, the people understood that and there was no requirement for it, either with respect to our people inhouse in [31] dealing with these people back there or the people back there dealing with us.

So we just expect them to conduct themselves ethically. And I even feel that way about former Boeing employees.

Q Mr. Wilson, did you feel at that time that employees of the Boeing Company could contact these employees while they were employed by the United States Government about Boeing business?

MR. SHARP: Wait a minute. Let's sort that question out.

Did he feel that people could contact people, what are you asking him?

BY MR. TERLEP:

Q Was it proper for the employees—

MR. SHARP: Proper?

MR. TERLEP: This is his opinion I'm asking. He's the Chairman of the Board of this company.

MR. SHARP: That is correct. And you're asking him a legal opinion here?

MR. TERLEP: I'm asking what he felt was proper.

A It would have been improper for them to contact them in any way that had anything to do with [32] Boeing business, relative to the government.

Some of them are personal friends, they leave, they have friends here and they probably are certainly going to speak to each other if they see each other. I've certainly spoken to them when I'm walking through the offices back there.

But I think the government and the company are very circumspect about those matters. I know a lot more of the specifics on other cases, but when I was working in the operations more directly, but I don't recall—there is just, we just don't do it. Not supposed to, don't. To the best of my knowledge.

BY MR. TERLEP:

Q What benefit did you think, do you think that the Boeing Company derived from making severance payments to these individuals?

A I think along with the people that come from other comparable companies that it improves the quality of the work of the Department of Defense or the Department of Commerce or whatever Department is involved.

It's very important. And incidently, so do the people that run those departments.

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[53] BY MR. TERLEP:

Q Do you recall being involved in the severance payment decision by Boeing to any other individuals?

A I think Mr. Little would have brought damn near all of them to me in the end. I don't recall having gotten involved in any details of their computation or anything else.

MR. TERLEP: That is all the questions I have at this time.

(Discussion off the record)

EXAMINATION

BY MR. SHARP:

Q Mr. Wilson, I have a very few questions.

Have you or to your knowledge others in the company been requested to assist the United States in recruiting qualified people?

A Yes.

Q Can you recall any specific examples where you entertained such requests?

A Well, there have been several, but I recall particularly Secretary Clemants asking several of us in industry to, basically telling us that we [54] had a duty to the country to identify people and then if they chose to try to encourage them to come into the government that we ought to do everything we could to encourage them to do so.

That was one case. And in that case I came back and made out a list I recall, of about twenty people. Most of the jobs they had were technical or many of them were. And frankly, at that time we had some outstanding technical people that were approaching retirement age that I thought would be good in the job.

And then he did in fact choose or the system chose one of those people. Not one of the retired ones, but one of the twenty or so that I recommended.

On another occasion, General Phillips who had been transferred from the military, from the Minuteman program to be the leader of the Appollo program in NASA, and of course Phillips knew our people extremely well and he asked for several people by name, quite informally. But he in fact got, I would guess that there were probably fifteen or twenty people, fifteen people at least that probably went back to NASA out of literally, out of the Minuteman program at that [55] time, and a couple of them were high level people within the company at the time. Those are two specific cases.

Q Mr. Wilson, were severance payments made by Boeing to any of the five individual Defendants in this case with an intent to supplement their government salaries?

A No. I think they were made to encourage them to view favorably changing their position, however they view it.

But I don't think you would think of it in the context of supplementing their salaries.

Q Did at the time these individuals left, to your knowledge, the company make any commitments to them regarding re-hiring them?

Let me rephrase that. To your knowledge, did the Boeing Company make any commitments at the time the individual who left to enter government service left, did the company make any commitment to rehire those individuals?

A No.

Q Were the severance payments, in your mind, made with any intent that these individuals would give the Boeing Company preferential treatment or favorable action while they were in government [56] service?

A No. I'd say it's just the opposite. In fact, other things being even I'd rather see people at Lockheed or something back there, because I think it makes it difficult for us to do business when our people are back there,

Incidentally, I think Lockheed feels the same way.

MR. SHARP: They'd rather they came from Boeing?

A Sure.

MR. SHARPE: I have no further questions

MR. FENDRICH: I have no questions.

MS. BERMAN: No questions.

EXAMINATION

BY MR. TERLEP:

Q When you refer to someone named Lehman, were you talking about the current Secretary of the Navy?

A Yes.

Q When the employees, the five employees that we're involved with here left the Boeing Company for their government employment, did you try to talk them out of leaving Boeing?

[57] A No.

Q Or did the company?

A In the first place, I didn't talk to any of them, I personally did not talk to any of them.

Q Did the company try to talk them out of it, if you know?

A Not, I would imagine the company probably encouraged them to take the jobs in general. That would be our, we want the government to have good people and we don't want to recommend people that are not good.

And obviously, so we would encourage them, as a general statement.

MR. TERLEP: That's all.

(Deposition concluded 10:20 A.M. Signature reserved)

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GOV. EX. 121

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION UPON ORAL EXAMINATION
OF STANLEY M. LITTLE JR.

November 5, 1986

1:30 P.M.

7755 Marginal Way South

Seattle, WA

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[25] Q How did you first learn about the Boeing severence payment practice, as you put it?

A I'm not sure how I first learned about it.

I guess I was probably aware of it from the fact that I was familiar with people who left the company and went into the position with the government.

Q Did anyone tell you what the policy was or the practice was?

A No, not at that time.

Q What is the date that we're talking about?

A I'm not sure. Probably twenty plus years ago.

Q So you learned that Boeing had a severance payment practice of some sort?

A Yes.

Q How did you learn of the particulars of that practice, how did you learn how it was applied?

A When I got into my current position I learned about it then.

[26] Q Which was when again sir?

A In 1972.

Q Who told you about it then?

A I don't recall specifically who told me about it.

Q Is the policy in writing?

A It's really not a formal policy. We have policies, formal company policies. This is more of a practice, it's not part of our official company policy manual or anything like that.

Q How do people find out about it in Boeing ranks?

A I published a memo that outlined the practice, but it wasn't until 1981 or 2.

Q Are you familiar with the following people: T. K. Jones?

A Um hum.

Q Melvin Paisley?

A Yes.

Q Herbert Reynolds?

A I don't, when I say I'm familiar, I know that, I know who he is, I do not know him personally. To the best of my knowledge, I have never talked to him.

Q Do you know whether or not he received a severance payment from the Boeing Company?

A I do know that, yes.

[27] Q Harold Kitson, Jr.?

A That would be the same thing. I don't know personally either, but I know he received a severance payment.

Q And Lawrence Crandon?

A Yes, same there.

Q Would your answer be the same?

A Same.

Q This memo you published with regard to the severance payment practice, was it after the severance payments were made to these five individuals?

A I'm not positive. I think it may have been in the middle.

Q How would you be able to refresh your recollection?

A I'd have to see a copy of the date of the memo and the day that each of those people left.

Q To whom did you distribute this memo?

A This was distributed to the Executive Council.

Q Who is on the Executive Council?

A I can't recall exactly who was on at that particular time, but it represents, it's probably a top six or eight executives in the company.

Q It wasn't distributed to all of the three hundred [28] members of the—

A No, no. As a matter of fact, it was never formally, this was a draft that was distributed to the Executive Council for their comments and review, it was never released beyond that.

Q It was never adopted as a formal policy?

A It was never adopted as a formal policy.

Q Was it adopted as a practice?

A It was kind of a recitation of the practice that had been in existence at that time.

Q Were there any changes to previous practice embodied in that memorandum?

A Not changes. It more or less codified what the past practices had been.

Q The five individuals that I've mentioned before, in the course of you official duties, did you have a role in the administration of the severance pay practice with regard to those individuals?

A Yes. And I can't be specific in each individual case, but the general role was that the operating company would make a recommendation to the corporate offices, our compensation staff would review that, would come up with a proposal on what the severance pay should be.

[29] I would review it and would review it for myself and satisfy myself that it was reasonable and then reviewed it with Mr. Wilson, who is the chief executive officer for final approval.

Q When you say operating company, was the same operating company involved with all five of these individuals?

A I believe so.

Q What operating company would that be?

A That would be the Boeing Aerospace Company.

Q They all worked for Boeing Aerospace prior to going to work for the government?

A I believe that is right.

Q Did you have any role in making the initial recommendation that these or any other individuals employed by Boeing receive a severance payment?

A I'm sorry.

Q Were you the original recommender in this chain?

A No.

Q Who would that have been?

A It would have been someone in the operating company from where they were employed. In this case, I guess in all five of these cases, from [30] the Aerospace Company.

Q Can you state what the severance pay policy is?

A In general I can. I can't recite the basis for the formula. But generally speaking, what we have tried to do is to give recognition when the government needs people for specific jobs and they come to us and they ask for specific individuals or come to us with a job to be filled, and ask for recommendations.

We try to perform our civic responsibility as a good corporate citizen by cooperating with the government to make people available.

And what we try to do is to recognize what the person has done for us, what he has earned in the way of benefits and to try to come close to making it possible for him to accept employment with the government.

That is basically what we attempt to do.

Q Why would it not be possible for someone to accept employment with the government?

A The benefit programs that he has here in many cases have provided him with more and better benefits. Frequently, the salaries are [31] different.

Q More or less?

A We have had it work both ways. But they are different. If the Boeing salary is less, obviously we don't do anything in that respect.

Q I don't understand.

A In trying to arrive at this we do give recognition to, or consideration to the fact that he may have to accept a lower salary and give consideration to that.

We also give consideration to the number of years that he's had in the savings plan and this sort of thing.

Q Is the severance payment that is made pursuant to this policy, is this in addition to the payments that you recited before that are made when someone resigns from Boeing?

A Yes, it would be.

Q When someone resigns from Boeing they're allowed to take out their Financial Security Plan deposits?

A Right.

Q Is that amount included in the severance payment?

A No, it's not.

Q The amount that the employee has put in the [32] voluntary investment plan over the years, is that included in the severance payment?

A No.

Q Is the company's contribution to the voluntary investment plan over the years included in the severance pay?

A No.

The vesting schedule however, if he leaves because he vests for the company's contribution on a rolling basis, so much the first year, another per cent the second year, so there is always a certain amount of the company's contribution which he is not able to take with him when he leaves.

Q You lost me.

What plan are we talking about now?

A Either one, it works the same way in both of them, either the Financial Security Plan or the Voluntary investment Plan.

Q So there is a vesting date for each plan?

A Yes.

And what I'm trying to say is that when the company makes a contribution and the person leaves, he gets, and I forget the numbers, but say the first year he would get twenty per cent [33] of what the company had put in, the second year he would get forty per cent, the third year fifty.

And these numbers aren't necessarily right. But at the end—and I really didn't, I can't remember the details, but it's after after a certain period of time before he's able to take the full amount out.

But he's always, at any given time, he always has so much money that at the lowest level the next level and so on, it's a rolling vested thing.

Q But the amount that is vested with regard to those who receive severance payments is the same as those who resign and withdraw their monies on their own, is that correct?

A That is correct.

Q I'm a little confused here. I think you said—perhaps we can have it read back if you don't remember it correctly—that a part of this severance payment had to do with their past service?

A Um hum.

Q What part of the severance payment has to do with the past service?

[34] A Everything that I have been talking about here, the fact that they have put their money into that, the company has matched it, but if they leave now they don't get that.

Q If they—

A If they terminate from the company, then that rolling vesting they would not get full vesting on everything that the company has put in.

Q Full vesting only applies to people who receive severance payments?

A No, no.

Full vesting only pertains to, applies to people who retire from the company or are laid off for lack of work. But a person that leaves voluntarily doesn't get that.

Q And that would also, that latter statement would also apply to one who leaves to go to work for the government, that they would not get that as well.

MR. SHARP: The answer is that it depends on whether one retires or resigns. One can go to government by retiring or resigning.

THE WITNESS: That is correct.

BY MR. TERLEP:

Q How would it differ?

[35] A If he retired to go to the government he would get the full vesting.

Q But not as a part of his severance payment?

A That's right.

Q He would get it in a lump sum difference?

A He would get it however he decided to take it. Lump sum would be one option.

Q But that wouldn't be part of the severance pay?

A That is correct.

Q Likewise, with those who resigned, whether or not they got the full vesting or only partial vesting, that would not be a part of the severance payment, is that correct?

A That's right.

Q That would be another payment of some kind?

A When you say those that resign, you mean resign, for any reason?

Q For any reason, including taking a job with the government?

A Quit.

Q They would still receive some payment, but it wouldn't be the fully vested payment?

A That's correct.

Q But the payment would be other than as a part of their severance payment?

[36] A Yes.

Q Those things we have just been talking about, they all have to do with past service with the Boeing Company?

A Right.

Q What part of the severance payment, of the amounts paid in the severance payment have to do with past service?

A It's all how we apply that.

We have a mathematical computation, but we use judgment along with that. It's not a pure mathematical calculation that comes up with a number and that's it.

Q Can you recall any part of the formula used to compute severance payments paid to these five individuals that we identified earlier?

A Yeah. I can't recall specifically, but generally what we look at in making our decision is what the matching would be for the period of time that the individual would be employed by the government, for the duration. And the way we have looked at the duration is being the remainder of the Presidential term and not to exceed four years. So.

And also until the individual is age [37] sixty-five.

* * * *

[101] BY MR. TERLEP:

Q Exhibit 21 refers to attachments does it not, Mr. Little?

A Yes, it refers, yes it does.

Q Do you recall receiving those attachments?

A I don't recall now.

Q I'll hand you Exhibit 22 and ask you if you have seen that before or can identify it?

A It's a work up of the formula for severance pay. I don't know whether I've seen this before or not.

Q Whose handwritting is that, do you know?

A I don't know.

Q It's not yours?

A It's not mine.

Q I show you Exhibit 23 and ask you if you can identify that?

[102] A I've never seen this.

Q Twenty-four, can you identify that document?

A No, I can't.

Q Have you seen it before?

A No.

Q Did you have a role in approving the severance payment made to Mr. Crandon?

A I can't remember whether I did or not.

Q Let's go back for a second to Mr. Kitson.

Did you receive any documents, other than Exhibit 21 with respect to the determination of the severance payment made to Mr. Kitson?

A Not, I don't remember.

MR. FENDRICH: As long as you have brought up Exhibit 21 again, I would simply point out for the record that if it hasn't already been done, that the handwriting that appears on the second page of that Exhibit is cutoff and that one can't read it in its entirety, the handwritten note on the bottom of page two.

BY MR. TERLEP:

Q I'll hand you what has been marked as Exhibit 25 and ask you if you can identify that document?

A I don't remember seeing this document.

Q Do you remember seeing a document in connection [103] with the Crandon determination that layed out how the severance payment was computed?

A I honestly can't remember.

Q Document number 26 and ask you if you can identify that?

A No, I can't.

I'm sure I did not see this document.

Q Do you know who Donna Moss is?

A No.

Q Document 27, can you identify that document?

A No, I've never seen this document.

Q Among the documents that were processed through for the various severance payment recipients, is there a way of determining by mark on the document or otherwise, the documents which you reviewed in connection with those severance payments in Boeing's files?

A Unless I would have initialed it or signed it or something, there is no mark of any kind.

Q Is it your practice to initial documents that you review or see?

A Yes, normally it is.

Q If there were an attachment to a document like Exhibit 17 or Exhibit, I think it's I 21, that had attachments to it, is it your practice to [104] initial the atachments as well as the—

A No, it isn't.

Q So we wouldn't know which documents, if there are documents in Boeing's files, which documents were documents that you had seen and which documents are those which you had not seen?

A If they were separated, that's right. If the attachments were removed from the cover letter that would be the case.

Q Did you see computations of severance payments for any of the five recipients?

A Yes.

Q Documents that included those?

A Yes.

Q What did they look like?

A Just like the ones we have been looking at.

Q They were in various sections?
A Yes.
Q The first section have to do with salary differential?
A Um hum.
Q The next section or another section had to do with the differential between the Voluntary Investment Plan payments and another section had to do with relocation costs?
[105] A Yes.

MS. WETZEL: I object. I think the documents speak for themselves, I'm just concerned that there may be—

MR. TERLEP: What documents? I'm asking him to identify the types of documents that he saw and what documents he considered.

I haven't seen Boeing's documents yet.

MS. WETZEL: He said they were of the type you had shown him earlier.

MR. TERLEP: But, he has denied seeing any of these documents.

So I'm just trying to figure out which documents he saw for, what are the types of documents, for later discovery in this case. We're going to have to pin it down one way or the other which documents he saw, if he can remember.

BY MR. TERLEP:

Q Going on.
It would also have a section dealing with relocation costs?
A Yes.
Q Would it have—

MS. WETZEL: I renew the objection. You're asking him whether the documents are [106] basically the same as the documents that he's looked at.

You're correct in characterizing his testimony, that he doesn't recall seeing specific documents, and he has told you I believe the best that he can, and that is that they are generally like the documents that you have marked as Exhibits here.

My concern is that you are characterizing those documents and I think the documents speak for themselves.

MR. TERLEP: I asked him if he had seen documents like these in connection with the severance payment determinations. He said he hasn't seen these particular documents that I've marked as Exhibits.

He said he has seen some. I'm just trying to figure out what they look like.

BY MR. TERLEP:

Q Did a section of those computations also deal with something called a high cost area supplement?
A Yes.
Q What does that mean to you?
A There is certain cities in the country where we [107] pay a differential to employees of ours that are assigned there. Where the cost, based on some standard, is higher than in the Seattle area.
Q That's applied to your, to Boeing employees, right?
A Yes.
Q You also made this a part of the severance payment determination, did you not?
A Yes.
Q When it's applied to Boeing employees, is the high cost area supplement a multiple of the employee's Boeing salary?
A Yes.
Q How does it work?
A Let's take Los Angeles.
If it's a ten per cent, if the differential is ten per cent higher than Seattle and a person earning fifty thousand dollars a year, if transferred to Los Angeles would earn, he would get a five thousand dollar addition, not to his base salary, but a cost of living allowance.
Q Supplement?
A Supplement.
Q When this was applied to those who received [108] severance payments as a part of the severance payment computation, what salary was used to determine the

amount to be paid, the employee's Boeing salary or the government salary, the government salary he expected to earn?

A I'm not sure.

Q When one considers the application of this policy for a Boeing employee, is it the base salary that is multiplied by the percentage or does that also include incentives?

A No, just the base salary.

Q Did there come a time when Boeing's severance payment policy changed or practice, I'm sorry, changed?

A No. It didn't, it hasn't changed. I suppose that it has evolved over a period of time. There is not, there has been no specific change in anything.

Our objective is still the same as it always has been, to try to make it possible for our employees to accept positions with the government when the government desires people with their background.

Q When these employees left Boeing, did you expect that they would go to work for the United States [109] Government?

A Yes.

Q You had every anticipation that they were going to go to work?

A Yes.

Q Did you have any anticipation that they wouldn't be hired by the government, that their appointment wouldn't go through?

A No.

Q What would have happened if one of these five individuals who received a severance payment left Boeing, moved to Washington, D.C. and then found out later that they weren't, their appointment didn't go through, that they weren't hired?

A I don't know.

I don't know, I've never considered that question.

Q Would you have asked for the severance payment money back?

A I don't think we could have.

Q Do you know who Marshall Hurd is?

A Yes, I know who he is, yes.

Q Did the scenerio I just described happen to him?

A Not to my knowledge.

Q Do you know whether or not Boeing—do you know [110] how these payments were treated for accounting purposes?

A No, I have no idea.

Q Do you know whether they were charged to an overhead pool used to determine payments on government accounts?

A I have no idea.

Q Who is Dean Thornton?

A He's President of the Boeing Commercial Airplane Company.

Q Do you know whether he had any dealings with the consideration of severance payment to Mr. Calhoun.

A No, I don't.

Q Who is Clive King?

A I don't recognize that name.

Q Do you know who Ronald Mann is?

A I know the name, I don't know the person.

Q Do you know whether a severance payment has been considered to be, was ever considered by Boeing to be made to him?

A No, I don't.

Q Do you know who Paul Turner is?

A. Yes. I think you asked me that earlier.

He's a personnel supervisor, or he was [111] at least, with the Aerospace Company.

Q When you recommended severance payments to be made to these individuals, individuals that you were involved with, did you seek the advice of counsel?

MS. WETZEL: Let me object for the record to the extent that this is getting into a area that calls for testimony that is protected by the attorney/client privilege. I'm going to instruct the witness not to answer.

MR. TERLEP: I didn't ask him for the advice, I asked him whether he sought advice. There is no communication that I'm seeking.

MS. WETZEL: The documents that you have and that you have already reviewed with the witness reflect a place where Mr. Albrecht, who the witness has identified as general counsel at the time, to concur in a particular severance payment.

The company is not relying on the advice of counsel defense in this case, and we frankly don't see where it has any relevance to the issue whatsoever.

I will hold to my instruction to the witness not to answer the question.

[112] BY MR. TERLEP:

Q Before you made your recommendation, did you seek the advice of counsel outside of the Boeing Company?

MS. WETZEL: Same objection, same instruction.

Again, Mr. Terlep, we are not relying on the advice of counsel to the defense. I don't see where it has any relevance to the issue whatsoever, that would lead to the discovery of admissible evidence.

MR. TERLEP: That has not been stated explicitly until this very moment.

MS. WETZEL: Well, I'll represent it to you on the record at this time on behalf of my client.

BY MR. TERLEP:

Q When these five employees left the Boeing Company, do you know whether an instruction was given to them to disqualify themselves from Boeing business when they were working with the government?

A No, I don't know that specifically.

Q You didn't give any instructions?

A I didn't. No. No, I didn't.

* * * *

[121] Q Do you know what Exhibit 29 is?

A Yes, it's, it appears to be the attachment to this memo, to Exhibit 28.

Q Who drafted this document, the attachment to Exhibit 28, internal operating procedure, did you draft it?

A No, I didn't draft it and I'm not sure who did draft it.

Q Did you ask anyone to draft an internal operating procedure having alternatives such as these?

A Yes.

Q Who did you ask?

A I asked Benson, his staff to do it.

Q Do you know whether number 19 is Benson's draft of this policy or this practice, whatever it is?

A It appears to be.

Q Was number 29, was the draft adopted by you in, by number 28?

A No, as I explained,—

Q I'm talking about by you.

A By me?

Q Yes.

A I felt it was worth passing on to the executive committee for review.

MR. TERLEP: That's all I have at this [122] time.

EXAMINATION

BY MS. WETZEL:

Q Mr. Little, with the severance payments made by the Boeing Company to the five individual Defendants in this case, who have been named during your previous testimony, were those payments intended as a supplement to those individual government salaries?

A No.

MR. TERLEP: I object, he already testified he doesn't know about all five of them.

MS. WETZEL: I believe that mischaracterizes his testimony. He's obviously aware that the payments have

been made as we have discussed those payments, and as you have had him testify about.

MR. TERLEP: If he doesn't know about the particulars of them how can he testify as to your question. We can read back your own objection of a half an hour ago.

MS. WETZEL: I know, I think your response was he can't testify to that which he doesn't know. I'm not asking that.

[123] BY MS. WETZEL:

Q Were the severance payments made to those individuals intended to in any way, to compensate them for their services as government employees?

A No, absolutely not.

Q Were the payments contingent in any way on the employees returning to Boeing at any time in the future?

A No.

Q Did Boeing at any time commit to rehiring them?

A No.

Q Did any of the individuals commit to returning to Boeing?

A Not to my knowledge.

Q Were the payments contingent upon any event other than the individual's departure from the company?

A No.

Q Were the payments given to the individuals with the intent or with the expectation that they would in any way render preferential treatment to Boeing during the testimony of their government employ?

MR. TERLEP: I object to this whole line of questioning. A proper foundation hasn't been laid to allow this witness to be able to [124] testify as to the state of mind of the employees, of what they expected or what the company expected of them.

MS. WETZEL: The question didn't ask as to the individuals expectations or intent. The question does ask as to his understanding of the company's intent acting as he did as an officer, or in his capacity.

MR. TERLEP: You can ask him what his intent was.

MS. WETZEL: No, let me ask my question and I'll ask your question as well.

BY MS. WETZEL:

Q Can you answer the question, do you recall the question?

Were the payments made to these individuals by Boeing made with the intent or the expectation that the individuals would ultimately render preferential treatment to the company?

A No, they were not.

Q And you had no such intent or expectation?

A Of course not, no.

Q In fact, Mr. Little, to your knowledge, did any of these individuals render preferential treatment to the company during the term of their [125] governmental employee?

A Not to my knowledge.

MR. TERLEP: For the record, I object on the grounds of relevance.

MS. WETZEL: I have no further questions.

MS. BERMAN: No question. Thank you.

MR. FENDRICH: No questions.

EXAMINATION

BY MR. TERLEP:

Q Do you know whether any of the five employees who are involved here expressed any indication about their wanting to return to the Boeing Company after they finished with their government employment?

A At the time that they left here, not to my knowledge, and I don't, of course Mr. Jones has returned to the company. But no, I'm not aware—

Q This is your current recollection?

A Um hum.

Q You have identified two documents that I think are number 17 and 21, that you reviewed in [126] connection with the severance payments of Mr. Kitson and Mr. Reynolds.

MS. WETZEL: For the record, I am not sure that Mr. Little's testimony is that he had seen number 17 is certain.

I think he was not certain that he had seen it. I apologize if I'm incorrect.

MR. TERLEP: I certainly wouldn't want to mischaracterize anything, my recollection was he had seen it, but he had not signed that copy.

MS. WETZEL: My notes indicate that he was not certain that he had seen it.

MR. TERLEP: That may not be the one anyway.

Can I see that please?

A I'm not certain I have seen this.

BY MR. TERLEP:

Q I hate to have to go back through the record to figure out what you said with regard to it, but we could.

Let me direct your attention to the second full paragraph, the last sentence in that paragraph and ask you to read—

MR. FENDRICH: Of which Exhibit?

MR. TERLEP: 17.

[127] BY MR. TERLEP:

A Okay, I stand corrected.

Q Does that refresh your recollection about your knowledge of whether or not one of the employees expressed a desire to return to Boeing after his employment with the government.

MS. WETZEL: Does this help your independent recollection?

A No, because I still don't remember it, even though I may have read it.

BY MR. TERLEP:

Q I ask you to take a look at number 21 and I think it's the last sentence of the first paragraph on that document has to do with Mr. Kitson.

The last sentence of the first paragraph.

A "Boeing management encourages Mr. Kitson to accept this assignment and supports his decision."

Q The last sentence of the second paragraph?

A It's the same thing, yeah, and that, I don't—

Q That doesn't refresh your recollection?

A No, although I signed this. So I certainly read it.

MR. TERLEP: That's all.

[128] (Deposition concluded at 5:30 P.M. Signature reserved)

* * * *

GOV. EX. 122

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION UPON ORAL EXAMINATION OF
H.K. HEBELER

November 6, 1986

2:00 P.M.

7755 Marginal Way South

Seattle, WA

* * * *

[3] EXAMINATION

BY MR. TERLEP:

Q Would you please state your full name and residence address?

A Henry Koester Hebeler, 13335 Southeast 243rd Place Kent, Washington 98042.

Q Mr. Hebeler, are you known by any other name?

A Yes, Bud, everyone calls me Bud.

Q By whom are you employed?

A Boeing Company.

Q In what capacity?

A President of Boeing Electronics Company.

Q How long have you held that position?

A Since the middle of last year.

Q That would be 1985?

A Right.

Q Prior to that time—how long have you been employed by Boeing?

[4] A Thirty years.

Q Prior to your most current position, in what capacity were you employed?

A President of Boeing Aerospace Company.

Q For how long?

A Five years.

Q From what dates to what dates?

A January '80 I believe it was until mid '85.

Q In the course of your duties as president of Boeing Aerospace, did you have an opportunity to consider severance payments?

A Yes.

Q To be made to any individuals of Boeing?

A Yes.

Q Who were those individuals?

A I can't remember them all, but T. K. Jones was one, Herb Reynolds was another.

Q Melvyn Paisley?

A Indirectly.

Q Harold Kitson?

A Yes.

Q Lawrence Crandon?

A Crandon as well. Kitson may also have been indirect, I don't remember much about Kitson.

Q Does Boeing have a severance payment policy or [5] practice?

A It has given severance pay. I don't know what you mean by policy.

I've never seen a policy on it.

Q There is nothing in writing?

A Not that I have seen.

Q Would you define it as a practice?

A It must be, we do it.

(Discussion off the record)

BY MR. TERLEP:

Q When did you first become aware of severance payment practice by the Boeing Company?

A Probably when they brought, if T.K. Jones was the first one, T.K. Jones.

Q Prior to the time that the first severance payment with which you were involved was made, is that what your testimony is?

A No.

Q You didn't know anything before that time?

A No.

Q But your first knowledge came in connection with the payments to those individuals with which you were involved, which we just identified?

A That is correct.

Q Who told you about the policy, who informed you [6] about the policy?

A I don't know of any policy.

Q About the practice?

A Whoever the industrial relation rep was at the time, that brought the piece of paper to me.

Q What piece of paper sir?

A To sign, to agree to a number.

Q Prior to receiving the first piece of paper, in relation to the severance payment of a particular individual, you didn' tknow that Boeing had a practice to make severance payments?

A No, sir.

Q What is your understanding of the severance payment practice, to whom is it applicable?

A It certainly was applicable to those people.

Q Who is eligible to receive severance payments, do you know?

A I suppose anybody is.

Q Do you know?

A No, I really you don't know.

Q What is your understanding of the practice, to whom is it applicable?

A I'd have to be honest with you, I've only had this experience with regard to those particular people.

[7] I have had a couple of requests from the government where I've had to lean on people, and in one of those instances I was told by headquarters a number I could mention. He didn't go to the government.

So there have been other cases.

Q What do you mean by lean on people?

A There was the Department of Immigration and Naturalization or something like that, that wanted Perry Sykes. And I was asked by Dick Albrecht to talk to Perry Sykes and try to convince him to go to work for the government, which I did.

I talked to him twice about that. And the second time I was given a number that I could cite with regard to severance pay, which I did.

Q In order to induce him to take the government job?

A Whatever. To have him understand that he would have some kind of a fair settlement from the company and he would be severed once and for all from the company.

Q Did you understand how the number that was given to you to give to Mr. Sykes was computed?

A No, I never did, I was just given a number.

[8] Q Mr. Albrecht gave you that number?

A That's correct.

Q What was your understanding of what that money was for?

A To sever his relation with the Boeing Company, severance pay.

Q Do you make severance payments to all employees who leave the Boeing Company?

A We must not, there are a lot of people that leave.

Q Are you aware of any severance payments that are made to individuals who leave the Boeing Company for jobs, other than with the United States Government?

A I've never had one brought before me.

Q The only ones that you have been concerned with have left to go to jobs with the United States Government?

A That is correct.

Q Do you have knowledge of how the severance payments are computed for any particular individual?

A Yes and no. They will come to me with a sheet of recommendation, that will have some kind of computation.

[9] Q Who?

A The Industrial Relations Department will come to me with some kind of tabulation and I'll examine that and see whether the number is reasonable.

Q Do you recall what factors are included on those tabulations?

A I couldn't recite that, that whole array of stuff. By the way, I'm not sure it's consistent all the time either.

Q You rely on the documents that are presented to you by the Industrial Relations staff?

A That's correct.

Q That is the Industrial Relations staff of what organization?

A Boeing Aerospace Company.

Q Not of the Boeing Corporation?

A The Boeing Aerospace Company Industrial Relations staff would coordinate with the headquarter's Industrial Relations people.

Q What is your understanding of the approval process for severance payments within Boeing, who does it need to go through, what steps does it need to go through to be approved?

A It had to go through me and it had to go to Clyde Skeen.

[10] Q Who was Clyde Skeen?

A He was my boss.

Q What is his title?

A Senior vice president of the Boeing Company.

Q Corporation, not the Aerospace Company?

A Corporation.

Q And after that?

A Stan Little got involved, and T. Wilson.

Q Did the recommendation have to come through someone to get to you?

A The personnel people put it together, Industrial Relations Department.

Q Industrial Relations people would recommend to pay a severance payment to a particular individual?

A That is correct.

Q And that recommendation would come to you?

A That is correct.

Q In what form?

A A letter.

Q Would there be attachments to the letter?

A Generally, there would be.

I say generally, as I recollect, they had something attached to them.

Q What would be included with the attachments?

[11] A If there was a calculation, the calculation would be attached.

Q Anything else?

A Not that I remember.

Q Did you have any conversations with any of the severance payment recipients about severance payments?

A I don't believe I ever had conversations with them.

Q Did you ever ask some member of you staff or people in Industrial Relations in the Aerospace Company to communicate anything to the individuals?

A What do you mean to communicate anything?

Q To write a letter to them about severance payment?

A No.

Q Was it your practice to draft a letter that would be sent to the individual receiving severance payments telling them the amount of the severance payment and

what date it was going to be paid on and that sort of thing?

A I assume the Boeing Company has some kind of a practice like that, but that would not be a normal thing that would come through me.

[12] Q That would not be something that you would do?

A No. Whenever somebody leaves the Boeing Company, the supervisors aren't involved, that is an Industrial Relations job.

Q Do you know how the Boeing Company's Voluntary Investment Program works?

A I'm part of that program, yes, I contribute to that program.

Q Could you give me your understanding of how it works?

A Yes, we can put in up to twelve per cent of our salary and Boeing Company will put in four per cent of our salary, annually. The company's contribution vests incrementally and I think it's like twenty per cent per year, so you have to be at the company five years to get the company's contribution.

Q Once you're there for five years, you're entitled to the company's contribution?

A Of what was given five years ago. Every year, like what what was given five years ago I would have a hundred per cent, and what was given four years ago I would have eighty per cent, what was given three years ago I would have sixty, two years, twenty, and zero for last year's.

[13] Q So that if you were to terminate your employment relationship with Boeing today, and withdrew funds from that plan, what would you get?

A I would get the total of my contributions less fifty per cent for income taxes, which is no minor point, because in no instance have we compensated any of these people for any kind of a rack up that I know of, a gross

up for taxes. And most of these people are in a higher tax bracket.

Q As a result of the severance payments?

A So whatever they get, they're going to have to pay taxes on, it's my understanding, and those are appreciable.

But anyway, if I quit the Boeing Company before I retire, I would get that as a lump sum. I would have to pay taxes on it, I would get my part of it and the part of it from the Boeing Company that was vested, but not the non-vested part.

Q Non-vested meaning the balance like for last year the eighty per cent balance and the previous year the sixty——

A A hundred per cent for last year and the eighty per cent for the year before, and so on.

[14] Q That is what you would not get?

A That is correct.

Q What about the Financial Security Plan?

A That is a lump sum.

When you leave the Boeing Company you walk away from certain things. Like in my case, I have a tremendous amount of sick leave, I have been sick from the Boeing Company only one or two days in thirty years, so I have a fantastic amount of sick leave.

The Financial Security Plan compensates you for part of that, but the rest of it you carry. If I would ever get sick for a long period of time, I would have some compensation coming in.

If you quit, you walk away from that.

Q If you retire do you, do you also walk away—

A You walk away from the days.

In either case, you get the number of dollars that would be put in the Financial Security Plan.

* * * *

[83] Q If there were an employee to receive a severance payment who was employed by the Boeing Aero-

space Company, in order for that person to receive the severance payment, it would have to be approved by you or Mr. Miller, is that correct?

A If he was in the Aerospace Company, yes he would.

Q I'll hand you Exhibit 25.

Have you ever seen that document?

A I may have. I just don't recollect.

Q 26?

A These area personnel people again. This is appropriate.

No I have not seen that.

Q This is Mr. Murphy again?

A Yes.

Q I direct your attention to number 26 to the last typewritten line on that page says, "Charge number" and it has a number of numbers on the end of it.

Do you know what that number is?

A No, I don't.

Q That is not a familiar—I don't know the exact number, but the pattern of numbers for instance?

A No. I don't even pay any attention to the ones [84]on my travel authorization.

Q Number 27?

A Never seen it. It's somebody paycheck?

Q Do you know who Donna Moss is?

A No.

Q Do you know how the severance payments were treated within either the Boeing Company or the Boeing Aerospace Company for accounting purposes?

A No.

Q Do you know whether they were charged to accounts used to determine government billings or billings on government contracts?

A No, whatever was done was done by a government procedure, I'll just bet though.

We have almost four hundred government auditors in this plant and they look at everything, many times.

The Department of Defense now has almost twenty thousand auditors. And if you include their, what it costs to support a person other than just their base salaries that has to be like two billion dollars a year.

Q Did you ever inform any of the severance payment recipients or instruct anyone working for you to inform them to disqualify themselves from Boeing [85] business when they began working with the government?

A No, but they would certainly do that.

Q Why would you believe that they would?

A The same way if you have a government employee that comes to work for us, they have to disqualify themselves from doing direct business for a certain period of time with that agency.

Q You would have expected that?

Did you expect that when you recommended the severance payments for these individuals?

A Yes, that's an ethics question, it seems to me. If you have, a former Boeing Company employee would exclude himself, it seems to me from a Boeing decision.

Q Why would he do that?

A I said, that is an ethics question. I don't know what the laws are on that, but that would be good ethical practice.

Q Why, in your mind?

A Because there would be a conflict of interest.

Q What do you think is a conflict of interest?

A I don't know.

MR. SHARP: Is this getting us [86] anywhere?

A I just think he would do it.

All the government employees that we have, it's a conflict of interest deal that we have, and it says that they have to exempt themselves from that and I know that when I place government employees that I cannot put them in a position where they have to sell to the same service, and it's because of conflict of interest and I would be shocked if there wasn't something in reverse.

Q Is there an actual conflict of interest or an appearance of conflict of interest?

A I don't know.

MR. SHARP: This has gone too far you're talking about legal distinction and he's not competent to testify to.

BY MR. TERLEP:

Q Do you know who Paul Turner is?

A Paul Turner was an Industrial Relations person, he worked in the Aerospace Company.

Q Do you know whether or not he had any responsibility with regard to the severance payment made to these five individuals?

A He would have been one of the people in the [87] Aerospace Company working that.

Q Did you have any conversations with him about these severance payments that you can recall.

A I can't recall any specific conversations, but it's very likely he would have been the kind of person that would have brought that paper to me.

Q Does he work for Mr. Rymond?

A Yes.

Q If these employees, we mentioned earlier about Mr. Paisley and his Presidential appointment and other employees going to work for the government who had an expectation that they would ultimately work for the Federal Government.

What would have happened with regard to the severance payment if the job fell through sometime between the time they left Boeing and the time they were supposed to take their government job?

MR. SHARP: Does your question presuppose they had already received the severance payment?

MR. TERLEP: Yes.

BY MR. TERLEP:

Q Would Boeing have asked for the severance payment back?

[88] A I can't imagine we would.

Q Would you have hired them back in that circumstance?

A If they had done it dishonestly, the answer is no. That is, if they knew they were not going to really get government employ, the answer is absolutely not.

If they believed that they were going to get government employ, everything supported that, the answer is, we would absolutely hire them back if they were misled.

Q But you would ask for the severance payment back wouldn't you?

A I don't know how we would work that. You'd have to reinstate all the stuff that he would lose because he quit.

You have what I consider to be a very theoretical question.

Q It didn't happen in any of these cases, did it?

A It hasn't happened, so—

MR. TERLEP: That's all I have at this point.

MR. SHARP: I have a few questions that I would like to ask Mr. Hebeler.

[89] EXAMINATION

BY MR. SHARP:

Q Mr. Hebeler, in response to questions earlier by Mr. Terlep, he asked you—

At the time these people, Paisley, Jones, Kitson, Crandon, Reynolds were leaving to go into government, did you have any reason to believe that the severance payments as granted by the Boeing Company were inconsistent with any federal standard, regulation or law?

A No.

MR. TERLEP: I object, there is no foundation for his knowledge of any Federal standard, regulation or law with regard to severance payment.

MR. SHARP: I was clarifying the question you left a very false impression on Mr. Terlep, and if you want, we can go back all through the record to find that question. But in deference to your request to both of us, particularly Mr. Fendrich, I did not interrupt you because I knew I could come back and correct it later.

MR. TERLEP: I'm just objecting to the foundation Mr. Sharp.

[90] BY MR. SHARP:

Q In your view, were the severance payments made to any of the five individuals that we have been discussing, intended by the Boeing Company or by you to be a supplementation of their government salaries?

A. No. Quite the contrary.

Q Did the making of those severance payments in any fashion depend on the job that those people accepted in government service?

A No.

Q When a person left Boeing with the severance payment was, were there any contingencies, was there any understanding about his ability to keep that money depending on what he did after he departed Boeing?

A. No, it was not discussed.

Q In fact, in your view, had an individual entered government service and left two weeks later, would he have left with the severance payment that Boeing had made?

A Yes.

Q Would that be true even if the individual left the government to join another commercial concern or competitor of Boeing's?

[91] A Yes.

MR. TERLEP: What is that that you're speaking of?

MR. SHARP: We referred to the meeting in the prior question, would you like it re-read?

MR. TERLEP: I'm not sure whether you're referring to whether he were allowed to keep the payment or—I'm not aware of any severance payments that were made to people who went to a commercial or private concern. I'm a little confused about what you're asking.

MR. SHARP: It doesn't seem like the witness was confused.

If you would like the question re-read we can have the Reporter re-read it.

MR. TERLEP: Okay, let's do that.

MR. SHARP: Would you re-read the last two questions for Mr. Terlep?

THE REPORTER: Read back last two questions.

MR. TERLEP: I withdraw my objection, I didn't understand the question.

BY MR. SHARP:

Q In your view Mr. Hebeler, were severance payments made by Boeing with any expectation that the [92] individual receiving them would accord Boeing some preferential treatment when they were in government?

A No.

Q To your knowledge was it the case that any one of the five individuals that we're discussing here today did in fact render some preferential treatment or favoritism to Boeing?

A No, in fact, it's almost the other way.

Q What do you mean it's almost the other way?

A It's very difficult to get access to them in comparison to some of their predecessors in the jobs.

Paisley was very difficult to get access to. He gave us a very hard time on the E-6 program.

MR. SHARP: I have no further questions.

MS. BERMAN: I have no questions.

MR. FENDRICH: I have nothing.

EXAMINATION

BY MR. TERLEP:

Q When Mr. Sharp asked you before about whether or not the severance payments to these individuals [93] was dependent upon their accepting a particular job in the government, are you aware of individuals who have left Boeing to take jobs with the government who have not received severance payments from Boeing?

A I really don't know.

Q You don't know?

A I assume that there are. There had to be people that just got mad and quit and walked away.

Q Is it your understanding that—

A Recently, in fact, I think there has been a policy recently where we don't give severance pay.

So if it's something very recent, I think the practice is not to give severance pay.

Q Is this a policy or practice that is in writing?

A I don't know whether it's in writing or not. But when all this stuff came about, as I understand it, Wilson or the board or someone said, we're not going to give severance pay.

So I don't believe there have been any cases since then.

Q But to your knowledge, the only people who have received severance payments are people who have left Boeing to take positions, high positions in [94] the Department of Defense is that right?

A I don't know that.

MS. BERMAN: I object to that. What do you mean by high?

MR. TERLEP:

Q Do you know of any people who have taken—are the only people that you know of who have been granted

severance payments by Boeing, the five individuals that are involved in this case?

A The only people I know that have got it?

Q Yes.

A The letter, I have cited people other than the five, Blaylock and Hua Lin and Plymale.

Q But you had no knowledge until this time that they had received severance payments?

A That's right.

Q Of the people that you know, would you characterize the positions that they took with the government as high level positions or low level positions?

A The Plymale job I recognize and I'd say that is a high level. I don't know what Hua Lin did and I don't know what Blaylock did.

Q Do you know what the five individuals in this case did?

[95] A At the time I knew what they were and I don't know that I could recite them. I know what T.K. did and I know what Paisley did and Herb Reynolds, but the others I certainly don't.

Q Would you consider those positions high level positions within the Department of Defense or Department of the Navy?

A Yes.

MR. TERLEP: That's all I have.

(Deposition concluded at 4:15 P.M. Signature reserved)

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GOV. EX. 123

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION UPON ORAL EXAMINATION
OF MARK K. MILLER

November 5, 1986

10:00 A.M.

7755 Marginal Way South

Seattle, WA

• • • • •

[9] Q Did you see any documents relating to the decision, regarding Mr. Reynolds?

A I may have, I may have been told the number.

Q The number?

A The calculation number, the calculated number, yes.

Q And Mr. Kitson, were you involved in that decision?

A Yes.

Q How were you involved in that decision?

A I knew of his application for severance pay and I am not positive, but I believe I acted for Hebeler in his absence in signing the paper that went forward.

Q Mr. Hebeler was your boss at that time?

A Yes, he was president of the Aerospace Company at that time.

Q And that is the position you hold now?

[10] A Yes.

Q And Mr. Crandon, were you involved in the severance payments decision?

A Yes.

Q In what capacity?

A Again, I think acting for Hebeler in his absence.

Q What did you do?

A I think I forwarded a recommendation to corporate.

Q When did you first learn that the Boeing Company had a severance payment policy or practice?

A I don't believe there is a policy. I think, really when Mel Paisley began to discuss with me his thoughts about leaving the company and going into the government. That really was the first time.

Q You had not heard of the practice, would you call it a practice?

A I would call it something that is applied to some people. It's not uniform. So it's not a practice in the uniform sense.

Q For our purposes in this deposition today, what would you like me to call it?

A It's your choice.

(Discussion off the record)

[11] BY MR. TERLEP:

Q Mr. Miller, do you understand that when I refer to a severance payment policy or practice, I'm referring to a practice of the Boeing Company. And for purposes of this deposition, can be agree that when I refer to that we're talking about a practice, we're not really talking about a formal policy of the Boeing Company, is that understood?

A Yes.

Q You had not heard of the practice of Boeing making severance payments to employees prior to the time that Mr. Paisley talked to you?

A No.

Q Who did you learn about the severance payment practice from?

A Paisley.

Q What did he tell you?

A He told me what he was applying for and the means by which he had arrived at what he thought was a number that he could rationalize.

Q Did he tell you what the practice was?

A No.

Q Did he tell you who he learned about the practice from?

A I can't recall whether he did or not.

[12] Q Did he show you any documents about what he thought the application of the practice should be, to him?

A No.

Q Did he tell you what he thought he should be paid as a severance payment?

A Yes.

Q Did he tell you what made up that amount?

A He gave a few examples.

Q Would you recite them for me please?

MR. SHARP: If you can recall.

A I really can't recall precisely. He was involved in the investment program, I think that was one.

BY MR. TERLEP:

Q How did that have an application to the severance payment practice?

A It was a benefit to him that he would not obtain if he were to go in with the government.

Q In other words, he wouldn't be paid his Voluntary Investment Plan or Boeing's Voluntary Investment Plan and contributions during the time that he—

A He had built up an interest in that in the time he had worked here, that the value of which he would lose to a certain degree if he went into the government.

[13] So he made some calculations as to that and I think some other things too, but I couldn't give you a list.

Q Did you understand him when he made that statement?

Did you understand what he meant when he made that statement about forfeiting things that he had built up?

A Yes, I understood him.

Q Can you tell me what he meant by that?

A Just what I said earlier.

Q What was built up?

A His investment in the plan and the company's contribution to it.

Q And he would lose that if he terminated his employment?

A He would lose the further growth of that.

Q The further growth, but he wouldn't lose anything that was already in the plan, is that correct?

MR. SHARP: Let's get the record straight here too. You're asking him what Mr. Paisley told him?

MR. TERLEP: I also asked him what his understanding of what he told him was.

[14] MR. SHARP: Just to make sure the record is clear, the questions you're asking Mr. Miller are not how the plan may work, but what he understood Mr. Paisley to be saying he was going to lose by leaving the company?

MR. TERLEP: That's exactly what I'm asking.

THE REPORTER: (Read back last question)

A The answer's I don't think so.

BY MR. TERLEP:

Q Would you please state your understanding of what Boeing severance payment practice is?

A It is a payment that takes into consideration the service the individual has performed for the company

and in considering he or she is going into the government, makes a recognition of the differences in what the value of that service the person has made to the company and their going into the government.

And so as to provide that individual with a situation in which he neither loses money nor gains any money from having taken that position in the government.

Q Loses or gains any money with regard to what?

[15] A With regard to his current position in Boeing.

Q With regard to the compensation and benefits he receives from the Boeing Company?

A Yes.

Q Is this your current understanding of the practice?

A Yes.

Q Is that the same understanding that you had when you were dealing with the severance payments to the individuals we mentioned earlier?

A Yes.

Q Are you familiar with the way that the amount of severance payment is calculated?

A No.

Q Do you know who is responsible for calculating?

A I believe it was done within Industrial Relations.

Q In the Boeing Company or in the Boeing Aerospace Company or—

A I think it would be yes to both questions. I think it was done initially in Boeing Aerospace, but—I really don't know beyond that.

I would assume it was redone or checked here, corporate.

Q In your dealing with the severance payments to the [16] five individuals I mentioned earlier—

MR. SHARP: He has indicated in testimony that he did not deal with severance payments of all five individuals.

BY MR. TERLEP:

Q With regard to the severance payments of the individuals that you mentioned, did you have an opportunity to review any documents that you can recall, in connection with those payments?

A Documents that, what kind of documents?

Q Any pieces of paper with writing on them?

A Yes.

Q Do you recall what they were?

A It was the transmittal letters.

Q What are those?

A Those are the recommendations of the Aerospace to corporate for what the amount might, should be.

Q Are there any attachments to those letters?

A There may be, I don't know, I don't recall.

Q I'll ask you to take a look at what has been marked as Exhibit 4 and ask you if you can identify that document, if you know what it is?

A It's an organizational chart.

Q Is there a date on it?

A There is.

[17] Q What is it an organizational chart of?

A The Boeing Aerospace Company.

Q Is your position listed on that chart?

A Yes.

Q Is it accurately listed on that chart as of the date of that chart?

A I would have to assume so.

Q I don't want you to assume.

Is it?

A I'm sure it is, yes.

Q I'll hand you what has been marked as Exhibit 12 and ask you if you can identify that document?

A No.

Q You've never seen it before?

A No.

Q Have you seen a document in connection with the severance payment made to Mr. Paisley?

A No.

Q You saw no documents?

A No documents.

Q I'll hand you what has been marked as Exhibit 13 and ask you if you can identify that?

A No.

Q Let's go back to number 12 for one second.

There is some handwriting on Exhibit [18] 12, do you recognize the handwriting on that document?

A No, I do not.

Q I hand you Exhibit 14 and ask you if you can identify that document?

A No.

Q Number 15?

A No.

Q Have you seen that?

A No.

Q Number 16, have you ever seen that document?

A No.

Q Did you have any conversations with Mr. Jones regarding his severance payment?

A He mentioned it to me, that it was in the process. I have no recollection of the details of that conversation.

* * * *

[57] Q Would you read the next sentence please?

A "Attachment B shows these calculations based on previous and approved methods of deeming these penalties".

Q There is no attachment to this Exhibit is there Mr. Miller?

A No sir, there is not.

Q Do you know what documents are referred to in that sentence?

A No, I don't.

Q Do you recall whether there were any attachments to this document when you signed it?

A No, I don't.

Q I'll request you to take a look at number 22 again after having read the sentence you just read, or number 21 and taking a look at number 22, do you know whether this was attachment B to the letter?

A No, I don't. It's not indicated there.

Q Do you recognize the handwriting on that Exhibit?

A No, I did not.

Q Read the next sentence please starting "additionally".

[58] A "Additionally Mr. Kitson has assessed his own financial situation based on accepting this assignment and his analysis is attached for information (see attachment C).

Q Was attachment C attached if you can recall to this document?

A No, I don't recall that it was.

Q Do you recall seeing any document prepared by Mr. Kitson having to do with what he thought his financial loss would be?

A I do not.

Q Turn to page two please. Read the next sentence. I'm not sure whether it's part of the previous paragraph or it's a new pargaraph. But it's the first sentence on page two.

A "I consider that the proposed termination considerations will serve the interests of the Boeing Company and will be fair and reasonable to the employee".

Q How would the proposed termination considerations serve the interests of the Boeing Company?

A There is a little redundancy in that sentence. Boeing interests is that the employee be treated fair and reasonably. And that is how it's in interest to the Boeing Company.

[59] Q Boeing had no interest that he would go to work for the government?

A In a generic sense as I related to you earlier, yes, not in any specifice sense. But from the standpoint of it's to the Boeing Company's and others in this industry

that are dealing with the Department of Defense to have qualified people working there.

Q What did you mean when you said be fair to the employee?

A Fair would again, is in the sense of the differential of how he's going to be compensated or what his pay would be in the government against those kinds of things he had built up while at Boeing.

Q We'll come back to that in a minute.

MR. SHARP: Are we going to read this whole letter?

MR. TERLEP: Probably.

BY MR. TERLEP:

Q The next sentence please?

A "In that regard I support a termination payment—

MR. FENDRICH: Do you really intend to have the record full of Mr. Miller reading the [60] sentences that appear in this document or would you prefer him to read them to himself as we read them and then have him comment.

MR. TERLEP: I tried to do that and you objected to my having him do that because you thought there was some confusion about where he was on the document. I'm just following your wishes.

MR. FENDRICH: It was Mr. Sharp and I believe it was on another section of another document.

MR. TERLEP: No, it was this very document.

MR. SHARP: If you want him to read it, he can read it.

A "In that regard I support a termination payment in the amount of fifty thousand dollars".

Q How did you figure that it was fifty thousand dollars?

A It was the advice of the Industrial Relations people, which I accepted.

Q Who advised you of that amount?

A The individual within Industrial Relations?

Q Yes.

A I can't recall.

[61] Q Were there any documents that contained that recommendation or advice other than this one?

A No, not to my knowledge.

Q You made no independent determination of the amount?

A I did not.

Q So this is not your recommendation, you're passing on the recommendation of someone else?

A I beg your pardon, it is my recommendation.

Q You're adopting the recommendation of someone else?

A Exactly.

Q But you don't know the basis for that recommendation?

A There are explanations that follow.

Q Do you understand those explanations?

A Yes.

Q Lets go to the first one.

What is the corporate formula?

A I don't know.

Q Didn't you just say you understood it?

MR. SHARP: Come on, Mr. Terlep, let's cut out the badgering, he's answering your questions as fairly, and fully as he can. And don't try to whipsaw him with any more of that [62] crap.

MR. TERLEP: It's not crap. He just said he understood.

MR. SHARP: He understands them and you're asking him what one word means and he says he doesn't recall and then you jump on him about it.

You're not being fair, you're not being reasonable.

A I understand what the calculation resulted in and the amount.

But your specific question was: Do I understand the corporate formula?

And my answer is: No, sir, I don't.

BY MR. TERLEP:

Q What is the corporate formula?

A I don't know.

Q How was the amount arrived at that is on line one?

A I don't know.

Q With regard to the paragraph that is numbered line two?

A Yes.

Q Do you understand how that amount was reached?

A No, I don't know how it was calculated.

[63] Q Line three?

A Yes.

Q Do you understand how that forty thousand dollars was calculated for Mr. Crandon?

A Not in a formula sense, no.

Q Line four talks about an alternate corporate approach. Do you understand what the alternate corporate approach was and what it was alternate to?

A No, I don't.

Q Were you aware of any previous determinations of financial penalties that is referred to in line four?

A No, I don't.

Q So you don't know what previous determinations of financial penalties that were included in this calculation in the amount of line 4?

A No, I don't.

Q Are you aware of how any previous severance payments were computed for anybody who received them in Boeing?

A No, sir.

Q Number 5 listed on that page, what analysis is being referred to in that sentence?

A I have to accept the sentence as written, it's [64] the analysis done by Mr. Kitson.

Q You didn't see that analysis?

A No, sir.

Q Who prepared this document, if you know?

A It would be my judgment that it was prepared in Industrial Relations, the individual I couldn't tell you.

Q The amount fifty thousand dollars doesn't appear in any of the lines one through five, does it Mr. Miller?

A It does not.

Q What made you accept the recommendation of fifty thousand dollars?

A It was a judgment of the Industrial Relations people who deal in these matters, and I had no reason to disagree. I accepted their judgment.

Q You can't remember the particular person who made the recommendation to you?

A No, I can't.

Q And there were no other documents other than this one that mention fifty thousand dollars as a recommendation?

A I don't know that for a fact. I only know this.

Q You're not aware of any?

A No, I'm not.

[65] Q Do you understand how the fifty thousand dollars was calculated?

A No.

I would assume it's just a judgment based on these; this spread of analyses.

Q What was the fifty thousand dollars intended to do? What was the fifty thousand dollar payment intended to do?

A It was intended to, as noted up above, to be fair and reasonable in striking the difference between what the person was going to receive as salary in the government against what he had built up at Boeing.

Q I'm still confused about the term "what he had built up at Boeing". In your mind does the severance payment policy have to do with the difference in a Boeing employee's compensation in terms of salary and incentive pay that he receives while he's a Boeing employee and

that which he will receive while he's a government employee?

A Yes.

Q Is that a factor in the determination of the amount?

A Yes.

[66] Q Is a factor in the determination of the amount the difference between the company's contribution to the voluntary investment plan and to the Financial Security Plan for the period that the government, that the employee is going to be with the government?

MR. SHARP: This I find very confusing. You're talking about whether it's a factoring amount. I assume of one of these listed formula, right?

You haven't identified which one.

MR. TERLEP: I know.

MR. SHARP: We have identified there are a variety of formula and calculations and we're not identifying which one of these you are trying to now relate to.

MR. TERLEP: That is exactly right. I'm just asking what his impression was, whether it was his understanding—we can go back and read the original question for you, Mr. Sharp—whether it was his understanding that these were factors in coming up with the amount?

And he has stated that they were.

MR. SHARP: Under all formulas?

MR. TERLEP: He can qualify his [67] answers.

MR. SHARP: Your question's so confusing.

MR. TERLEP: We can go back and read the question.

MR. SHARP: I know the question, that's why I'm making an objection.

If you wish to ask him about the attributes of a given formula it would be less deceptive and much more honest of you to ask him about a specific formula.

MR. TERLEP: I don't think there is any reason to impune my integrity here.

MR. SHARP: I'm beginning to wonder if there is. You went through all these formulas, he told you what

he knew about them and then you come back and ask him if this is a specific element of the calculation. He just told you that the fifty thousand dollars was a reasonable figure under all these calculations, the specifics of which he did not know. It's a very unfair question.

MR. TERLEP: It's his recommendation.

MR. SHARP: You're either doing it by accident or intent. If you're doing it by intent [68] then I'm ready to impune your motives.

MR. TERLEP: I'd like an answer to the question.

MR. SHARP: Re-read the question please.

THE REPORTER: (Read back last question).

MR. SHARP: I object to the question in that it's unclear what factor we're speaking of and to which amount we're speaking of.

If the witness understands the question he may attempt an answer.

BY MR. TERLEP:

Q Do you understand the question Mr. Miller?

A I would say this: I don't know what these formulas are, I've never seen one. It would seem reasonable to me and I have been told that they do take into consideration such factors as you just described.

Q Who told you that?

A Industrial Relations, someone in Industrial Relations.

Q In the Boeing Aerospace Company or corporate?

A It could have been either or both.

Q Was this before you signed this memorandum?

[69] A Yes.

Q Again, I'm trying to tie this knowledge of these factors to one of these calculations that's mentioned in paragraphs numbered one through five.

Do you know if the factors that I mentioned are a part of something that is identified here as the corporate formula?

A I have no specific knowledge of that, no.

Q Do you know whether it's a part of the alternate corporate approach?

A I have no understanding of that approach either.

Q But do you have an understanding that the factors that I mentioned are a part of one of those approaches?

A It would seem reasonable.

But I don't have any personal knowledge, no, if that is a factor or how weighted in those formulas, and I have said that three times.

Q What did the person in corporate tell you about the factors that were included?

MR. SHARP: I object. He said he may have talked to someone in corporate.

BY MR. TERLEP:

[70] Q Did someone in corporate inform you of the factors?

A No, not in a sense you're asking.

In conversations with people in Industrial Relations that may have included corporate, I can't really recall specific instances, I was made aware of the considerations that went into these things. How they were factors and how they were weighted, I have no idea.

And I couldn't even tell you what the sum total of all the factors were.

Q Can you enumerate the factors?

A No.

Q Can you tell me the considerations?

A No.

Q Was one of the considerations that you just referred to the difference between the amount that an employee would receive from The Boeing Company in his Voluntary Investment Program for the time from when he left Boeing during time he was in service with the government, prospectively.

MS. BERMAN: I think that was asked and answered.

[71] MR. TERLEP: I tried to ask it. I didn't get an answer.

MS. BERMAN: He said he didn't know.

MR. TERLEP: I just asked him if this was one of the considerations that he was informed about?

We have talked about the salary differential?

A Are you asking that again?

BY MR. TERLEP:

Q That was a factor; is that correct?

A I understand it is.

Q Was another factor the prospective difference between what an employee would receive if he had stayed with Boeing—

A Substitute a word for prospective.

Q Forward looking.

A Oh.

Q What an employee would receive if he stayed with Boeing during the time that he was expected to be with the government?

A I'm not qualified to answer that. I don't know how that was calculated.

Q But you don't know whether that was a factor or not?

[72] A I don't know, no.

Q I ask you the same question with regard to the Financial Security Plan: Boeing's contributions, did you know whether that was a factor; the amount that an employee would earn if he had stayed with Boeing during the time he was expected to be with the government?

A That may have been a consideration. I really don't know what that formula is.

Q You don't know or can't remember? Did you ever know?

A No, I never knew.

Q You were never informed that that was a consideration, this was not one of the things that corporate—

A I was never informed of the formula. I was never interested, as a matter of fact.

Q But this wasn't one of the factors that some person in Industrial Relations told you was included?

MS. WETZEL: Objection. Asked and answered. You've asked him this question several times and he said he doesn't recall that.

BY MR. TERLEP:

Q Can you answer the question?

[73] A I don't have any recollection of anybody telling me exactly what these factors are, no.

Q Did you understand whether or not the payment of relocation costs was a factor in the severance payment?

A Again, it was my understanding that was a consideration. But I'm a little hazy on that because the government does pay relocation costs, and how that was brought into the consideration, I don't really know. But that is a cost of moving. And I don't know how it was calculated.

Q But do you understand the payment of some portion of relocation costs was a part of the calculation?

A No, I don't.

Q Do you know what a high cost area supplement is?

A We have areas where we have people located where the cost of living is higher than here. And while they're assigned to these areas they do get an adjustment.

Q Do you know whether the payment of some type of high cost area supplement was included in the computation of the severance payments?

A Not specifically, no.

Q Generally?

[74] A I think there was consideration for that area, I'm not quite sure how that would have been applied though.

Q Do you know whether or not or do you know how Boeing Aerospace Company treats these payments for accounting purposes?

A No.

Q Do you know whether or not they were included in any account or in any calculation that is used, overhead

pool for instance, to determine government contract payments?

A That is the same question.

No, I don't.

Q Are you an accountant?

A No, sir, I'm not.

(Short recess)

MR. FENDRICH: If you intend to move away from this document I'd like to ask the witness a question or two about it before we move on.

MR. TERLEP: I don't know whether I intend to move away from it yet, I'd like to review my notes for a second.

(Short recess)

MR. TERLEP: I'm not finished with the [75] witness, but if Mr. Fendrich would like to ask him a question about this document, I have no objection.

EXAMINATION

BY MR. FENDRICH:

Q Again, directing your attention to the document that has been marked as Exhibit 21-A. Mr. Miller, when you signed this document for Mr. Hebeler, did the document represent in your view a final action of the Boeing Company with respect to severance payment that was contemplated for Mr. Kitson?

A No.

Q Was it a recommendation that you passed forward, up the line, to corporate?

A Exactly.

Q Would you please read into the record the handwritten notation that appears on page two next to the signatures?

A "I concur, but only if the paragraph marked with the asterisk on page 1 is deleted and no prospective

promises or considerations are held out to the employee, DPB."

Q And do you recognize those initials DPB?

[76] A I do.

Q Whose initials are those?

A Doug Beighle.

Q What was Mr. Beighle's position, if you know at that time?

Let me ask you this, was he in corporate of the Boeing Corporation?

A Yes, sir.

Q Was he your superior in the corporate hierarchy?

A Not in a direct sense. I think Doug was corporate counsel at that time.

Q That was added after you had subscribed this document?

A He certainly was a superior in the sense of this fact, yes.

Q And if I understand correctly, this handwritten addition was made after you passed this recommendation on?

A That is correct, it would supercede what we had recommended. It really is an effective finding of our recommendation.

* * * *

GOV. EX. 124

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION OF CHARLES P. HAGBERG

Washington, D.C.
November 12, 1986

* * * *

[5] Whereupon,

CHARLES P. HAGBERG

was called for examination by counsel for Plaintiff, and having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

Q Would you state your full name, sir, and resident address?

A Charles Paul Hagberg, 1849 121st Avenue, Southeast Bellevue, Washington.

Q Bellevue, Washington, in the Seattle area?

A Correct.

Q By whom are you employed, sir?

A I am employed by The Boeing Company.

Q In what capacity?

A I am presently the Corporate Director of Compensation for The Boeing Company.

Q How long have you been in that position?

A Approximately a year.

Q Prior to that time—how long have you been employed by Boeing?

[6] A 28 years.

Q Prior to your current position, in what position were you employed?

A I was the Assistant Director for Corporate Compensation from April '81 until approximately a year ago.

Q Prior to that time what was your position?

A I was the Compensation Manager for the Boeing Aerospace Company for seven or eight years preceding that.

Q What does that job entail, the last job that you just mentioned?

A The Boeing Aerospace job?

Q Yes.

A Well, I was responsible for compensation matters associated with Boeing Aerospace Company operations excluding those for executives, which was handled by a peer of mine. That entailed the conduct of merit reviews and processing salary increases, special requests for compensation, et cetera.

Q But you yourself did not have any contact with compensation for executive employees?

A Not at that point in time.

Q And when you assumed your position with the Corporate Headquarters—I suppose that is something different [7] from the Boeing Aerospace Company, is that correct?

A Yes.

Q And you were Assistant Director of Compensation?

A Yes.

Q What did your duties there include?

A Primary focus initially was with union relations. I went there as the Assistant with the anticipation of taking over the job ultimately when my boss retired, but I was being trained with—initially with union relationships because of the long time it takes to develop those relationships with union officials. But I was involved in many other aspects as well of corporate compensation activities.

Q And what are your duties with your current position?

A I supervise a staff of 12 people responsible for the development and maintenance of corporate policies associated with all manners of compensation issues, pay practices, foreign travel, as well as the involvement with union negotiations, development of wage packages for those negotiations, et cetera.

Q Do your duties in your last two positions have to do with determination of compensation for executives?

A "Termination of compensation"?

[8] Q A determination—

A Oh, I see.

Q —of compensation for executives, as opposed to your previous position which did not?

A Yes. Yes, it does.

Q In any of the last three positions that you have listed, did you become aware of any policy or practice on behalf of the Boeing Company with regard to severance payment?

A Yes, I did.

Q When was that?

A When I went to the corporate office in April of '81.

Q Prior to that time you did not know about any policy or practices of The Boeing Company regarding severance payments?

A I was aware of a practice, but I wasn't personally involved.

Q What did you know about the practice at that time?

A Simply that we had a practice of Boeing severance pay to some individuals who had gone to work for the government.

Q Was it your understanding, was the practice limited to employees going to work for the government?

MR. BENNETT: Now, at what point in time are we [9] talking about?

I don't know whether you are talking about '81 or prior to '81 or now.

MR. TERLEP: I was continuing the line of questioning about when he first knew about it.

BY MR. TERLEP:

Q But, all right, prior to the time that you came to the corporate office, which is the time that you stated that you first learned of the severance payment practice—

A Yes.

Q —did you understand that it was—or whether it was limited only to employees leaving to go to the United States Government?

A My personal knowledge was limited to people who had gone to work for the government, but at that point in time I knew of no specific limitations.

Q I see. Did you know of individuals who had received severance payments at that time, in April of 1981?

A Yes, I knew of—well, prior to April of '81 I was aware of a couple of individuals who received terminal payments, or severance pay.

Q And who were they?

[10] A George Hage and Ben Plymale.

Q How do you spell their last names?

A Plymale is P-l-y-m-a-l-e, since deceased, and George Hage is H-a-g-e.

Q Do you know when Mr. Plymale died?

A Gosh—I don't offhand.

Would you like for me to guess?

Q Oh, no.

MR. BENNETT: No, no. You don't guess.

BY MR. TERLEP:

Q It comes as a surprise to me that he died. I had not heard that before.

A Oh.

Q How did you learn that severance payments had been made to these individuals?

MR. BENNETT: If you know.

THE WITNESS: I don't recall how I became aware. I was—

MR. BENNETT: You have answered the question.

BY MR. TERLEP:

Q Did you speak to them about, either of these individuals about severance payments?

[11] A Not directly, no.

Q Did you speak to them indirectly?

A No, I didn't.

MR. BENNETT: I am going to let you get away with that one.

I don't know how one speaks to someone indirectly.

MR. TERLEP: I don't know how they speak to them directly either.

MR. BENNETT: But anyway.

BY MR. TERLEP:

Q Did there come a time after April of 1981 when you were in your position as Assistant Director of Corporate Compensation that you learned anything further about Boeing's severance payments practice?

A Yes. One of the first assignments given me by my boss was to develop and, in effect, standardize an approach to severance payments.

Q Who was your boss?

A Bob Benson.

Q And what did he tell you to do?

A To review the files of previous severance payments and develop a standardized approach that we could use

for [12] payments from that point forward, prospective payments.

Q Did you review those files?

A I did.

Q When was that that Mr. Benson gave you that direction?

A I don't recall specifically, but it was within two or three months of my original assignment to the corporate office, which began April 1st.

Q Did you ultimately develop a response to Mr. Benson's request?

A Yes, I did.

Q When did you develop that response?

A Again I don't have a clear recollection, but in that time period.

Q Well, what was the response?

A It was a four-part approach—I guess four-part approach is appropriate—which identified losses that an employee might incur by accepting employment with the government.

Q What were the factors that were listed in each of those parts?

A Base salary differential was the first one as I [13] recall.

Q What do you mean by that "base salary differential"?

A The salary at Boeing versus the proposed salary in a proposed government office.

Q How would you find out the proposed government salary?

A Well, typically that was told to us by the organization that was recommending the severance pay, and I believe typically it was provided by the employee himself, and verified with the government.

Q Were there any other parts to that first factor having to do with salary differential?

A No.

Q Was there a multiplier by the number of years that the employee was expected to be with the government?

A Yes, we did develop that as we refined that process.

Q When did that part of the first factor, the factor having to do with salary differential, when was that developed?

MR. BENNETT: You mean a specific date? or—

THE WITNESS: I don't understand.

MR. TERLEP: He said it was developed as he went [14] along. I am trying to pin it down to whether it was when he made his report to Benson about the proposal, or whether it came after that time.

THE WITNESS: It came after that time.

I don't specifically recall, but it came about as a result of—

MR. BENNETT: He didn't ask you how it came about. He asked you what time.

THE WITNESS: Okay.

MR. BENNETT: Just answer his question.

BY MR. TERLEP:

Q How did it come about, Mr. Hagberg?

A It came about as a result of some individual—let me back up.

It came about roughly six months after my assignment when it was discovered that a person would not be working for the government for full term of the then current Administration, or appeared likely they would not be.

Q Did the term of the then current Administration play some role in determining the first factor?

A Yes, at least in my view it did; since these were appointive positions, I assumed that they would last for [15] four years, roughly.

Q Until the end of the then current presidential term?

A Yes.

Q Was that the ultimate figure that was used in this factor?

A Yes.

Q Did the factor which you are discussing include just base salary at Boeing, or did it include other factors as well, like incentive pay, or bonuses, or things like that?

A Yes, it involved incentive pay where appropriate.

Q How as that entered into the equation?

A Just as a factor of normal expected incentive pay per the formula for the appropriate executive.

Q Was it normal for executives at Boeing to receive incentive pay?

A Yes. Executives as we define them.

Q How do you define executives?

A Well, the top echelon of the company, roughly at that time 300 or ther abouts, were eligible for incentive pay annually.

Q Did they all receive incentive pay during that time?

MR. BENNETT: During what time?

[16] MR. TERLEP: During 1981: He is talking about 1981.

THE WITNESS: I don't know that all of them received—whether or not all of them received incentive pay.

BY MR. TERLEP:

Q How did you determine the figure to plug into this equation having to do with incentive pay? Did you make any assumptions with regard to incentive pay?

A Yes. Each of those individuals in the executive payroll were assigned to a grade level, and each grade level has a standard or a normal incentive award amount.

That normal award is subject to a multiplier based upon company performance as well as individual performance within each of those company elements.

For purposes of this formula, we made no performance assumptions, but rather we just used the normal award for the particular salary grade.

Q And you added that to their base salary?

A Correct.

Q Were there any other amounts that you added to those wo amounts?

A No.

Q Okay. With regard to the second factor in this [17] recommendation that you have established for Mr. Benson, what was that?

A It had to do with losses or potential losses associated with the financial security plan and the voluntary investment plan.

Q Would you explain those for us, please?

A The financial security plan is an account established whereby an individual who uses 40 hours or less of his sick leave in any particular year may place the remaining 40 hours, or up to 40 hours, in an account called the "financial security plan account." It is a trusted account that is managed by an investor and it becomes a vested account of the employee so banking those hours, unless at some subsequent time he becomes ill and exhausts his unreserved sick leave, at which time he can avail himelf the opportunity to draw down that account as time off with pay.

Q You were just speaking about the financial security account, is that correct?

A That is correct.

Q Now, how does your consideration of that enter into your computations?

A We assumed, based on previous usage or previous [18] practice, that the employee would—would bank the appropriate hours over the next several years, or the years associated with his potential employment with the government.

Q Again, this would be—

A He would not be able to avail himself of the opportunity to bank those hours.

Q Again, this would be the term remaining—or the amount of years remaing on the presidential term?

A Yes, correct.

Q Did you take a look at the employee's past leave record to determine the amount to be applied for the remaining portion of the presidential term?

A Yes, I thought I said we looked at the pattern of usage and assuming a similar pattern.

Q And you converted those hours into a dollar figure?

A Yes, it was just hours times the current rate of pay.

Q Per hour or per day or—

A The hours times the current rate of pay.

Q Were any Boeing executives paid by the hour?

A All Boeing employees are essentially paid by the hour. We advertise their salaries as annual salaries, but [19] payroll in fact uses an hourly rate based on 2,088 hours per working year.

Q Okay. Were there any other factors used in the second part of your recommendation?

A Yes. Employees, as it relates to the voluntary investment plan, employees have an opportunity to invest up to 12 percent of their pay in a voluntary investment plan, and the company will match 50 cents on the dollar up to 8 per cent of that investment.

Again, we looked at the pattern of investment of individuals and assumed that that pattern would continue prospectively, and that they would not have the opportunity to receive a company matching in their investment for the period of time remaining in the then current Administration.

Q Were there any other factors associated with the voluntary investment plan included in that second figure?

A Yes, there were—there was.

People resigning their employment with the company forfeited part of the company investment on their behalf. On the investing schedule, they forfeited 80 percent of the previous year's company match, 60 percent for the year preceding that, 40 percent for the year preceding that, and 20 [20] percent for every year preceding that one, or the fourth year.

So we made up that difference, in effect, or calculated that amount and credited that as a part of the severance pay.

MR. BENNETT: Excuse me, could I request that you are using the words "factor" and "factors" in different ways at different times. I mean, for example, your last question was whether any other factors pertaining to the second factor, and it gets very confusing. I just want to be sure that you are using the word the same way with each question.

MR. TERLEP: It appears that the witness understands what I am saying.

But I will agree on any terminology that you suggest.

MR. BENNETT: I just think that when you say "Are there any other factors dealing with the second factor, it is just that it lends itself to confusion, that's all.

MR. TERLEP: Well, I will try—

MR. BENNETT: It is a request, that is all.

MR. TERLEP: I will try to clarify that.

BY MR. TERLEP:

Q In the second part of your recommendation, which is [21] what we have been talking about in the last few minutes—

A Yes.

Q —was there a factor included regarding the voluntary investment program that had to do with the forfeiture of any employee, any amounts already accrued to an employee's account?

A Yes, that is what I just attempted to describe.

Q No, in fact already accrued? The employee would have placed his own contributions over the years into that account?

Your formula or your recommendation did not include those amounts, did they? For forfeiture of those amounts?

A No. There was never a forfeiture of the employee's contributions, only the company's contributions on their behalf.

Q And, likewise, there is not a forfeiture of the company's contributions up to those percentages that you testified to two or three questions ago? For instance, if I understand it correctly, that over the past year there would not be a forfeiture of 20 percent, but there would be a forfeiture of 80 percent, is that correct?

A Correct.

Q And your figure did not include that 20 percent?

[22] A No. Only the forfeiture amount.

Now, wait a minute.

Our calculation accounting is only for potential forfeiture.

Q Nonvested? The nonvested?

A The nonvested part of the account, yes.

Q Did your recommendation include a third factor or third consideration regarding relocation costs?

A Oh. Yes.

Q And could you explain that factor or that consideration?

A We proposed that if an individual was not being provided a household move by the employing agency, we took that into consideration and had estimates made and provided for an amount to move the person's household goods and relocation of he or she and their family in accordance with our normal relocation policies.

Q Did you intend to pick up the difference or pay the difference between what the government would pay and what it would cost the employee to move?

A My recollection is that it was either the government paid for the move or we paid for the move. I don't recall [23] getting involved in evaluating how much the government would pay versus how much we would pay in trying to establish a differential there.

Q Was there a factor that had to do with the difference in the cost of living between Seattle and Washington, D. C.?

A Yes, there was.

Q Would you explain that factor, please?

A When Boeing transfers employees to the Washington area, we provide them with a 10 percent allowance, which is based on the difference in cost of living between Seattle and Washington, D. C., based on data provided by a consultant called Ruzenheimer—I wish I could spell it.

Again, we applied that same 10 percent factor for the cost of living differential for liberation of the proposed assignment.

Q Were there any other factors that were included in this recommendation?

A I believe that's the four of them, if I recall correctly.

Q Did you make any recommendation with regard to the loss of insurance benefits, either life insurance or health insurance?

[24] A I believe only in one instance where a person was assigned to the executive payroll, one of the individuals, one of the four individuals was assigned to executive payroll and we had some additional considerations for that in terms—

Q I am asking you about the recommendation that you made first. We will get to the application as to each individual later.

With regard to your—

A My initial recommendation?

Q Yes.

A No, there was no additional recommendation.

Q Anything having to do with vacation or paid holidays?

MR. BENNETT: Wait a minute. It is the form of the question I object to.

I mean, your whole question was "Anything having to do with"—it has no beginning or end of point of reference.

Could you be more specific?

MR. TERLEP: I will try to do that.

MR. BENNETT: I am not clear if you are limiting it to the financial factor or what you are talking about.

[25] BY MR. TERLEP:

Q In the recommendation which you made to Mr. Benson—the thing that we have been talking about for the last half an hour—

MR. BENNETT: Excuse me. When you say "recommendation," do you mean number, the total severance pay? What are you talking about?

MR. TERLEP: He stated that he made a recommendation to Mr. Benson about how to calculate severance payments, and that that recommendation had a number of factors on it.

I have been asking him whether or not the recommendation included factors that had to do with factors that I am mentioning.

MR. BENNETT: I don't think that has been his testimony.

Go ahead.

BY MR. TERLEP:

Q Has that been your testimony, Mr. Hagberg?

A I am sorry?

Q Did I characterize your testimony correctly?

MR. BENNETT: No, no, the record speaks for itself.

BY MR. TERLEP:

[26] Q Did your recommendation include factors which would include dollar amounts associated with the loss of vacation or holidays?

A No.

Q Did there come a time when your recommendation was accepted by the company?

A Yes.

Q Did there come a time that the recommendation you have just described was ever applied to any individual receiving a severance payment?

A Yes.

(Exhibits previously marked were remarked Plaintiff's Exhibits Nos. 6 through 11, 17 through 20, and 22 through 29, respectively, for identification.)

BY MR. TERLEP:

Q I will hand you Exhibit Number 8—these are remarks of the exhibits that were marked in previous depositions in Seattle. I assume counsel has copies of them. If not, I have additional copies. (Handing document to witness)

[27] I ask you if you can identify that document?

A (Perusing document)

MR. SHARP: Just to make the record clear, this has been marked today's Exhibit 8?

MR. TERLEP: We have remarked—we are using the same documents. We had asked the reporter to send the documents from Seattle; they did not arrive, the original, the documents that were marked on all the depositions last week. So I intended to use them the same—this is a copy of the same document that was marked as Exhibit 8—

MR. BENNETT: In Seattle.

MR. TERLEP: —in Seattle, yes.

MS. WETSEL: So the record is clear, it is U. S. Exhibit 8?

MR. TERLEP: Yes, however she remarked them.

MR. SHARP: Well, you have given this reporter documents which you have represented were previously marked, and she has marked them with the numbers that you have told her to mark them with?

MR. TERLEP: That is exactly correct. And they are—

MR. SHARP: Not to impugn your integrity or accuracy, but in point of fact, we don't know if this is the same Exhibit [28] that was marked Exhibit 8.

MR. TERLEP: We can adjourn the deposition and wait until they arrive.

MR. BENNETT: Yes, we do—I have Exhibit 8. We have taken care of that.

MR. SHARP: All right.

MR. BENNETT: I understand, Just go ahead.

MR. TERLEP: You can take my representation, Mr. Sharp, that from the very same folder that I handed you a copy of Exhibit 8 last week, I withdrew a copy of Exhibit 8 and all the other exhibits that we are talking about today from separate folders, handed them to the reporter, and asked her to mark them as such. To the best of my knowledge, they are the self-same exhibit numbers. They are certainly copies of the same documents that were used last week as the various exhibits in those depositions, copied from the very same original.

MR. BENNETT: Excuse me.

(Discussion off the record.)

BY MR. TERLEP:

Q You have before you, Mr. Hagberg, Exhibit Number 8 and I ask you if you can identify that document? [29] A It appears as one of the worksheets that was used in calculating possible severance pay.

Q Do you know to whom it applies?

A No, I don't offhand.

Q Did you review any documents in preparation for this deposition?

A Yes.

Q Did you review the documents that were used to calculate severance payments, or used in consideration of Boeing's making severance payments to various individuals who are defendants in this case?

A Yes.

Q And your testimony is that you cannot identify this document as being related to any of those?

MR. BENNETT: Well, wait a minute. I object. That is not what the witness said.

You have given him an exhibit marked Number 8 that doesn't have anybody's name on it or any point of reference, and I think that is an unfair question and unfair characterization of his testimony.

MR. TERLEP: Well, he is here for purposes of responding to a 30(b)(6) notice of deposition to testify on [30] behalf of the company.

MR. BENNETT: That is correct, but you can't give him a document that doesn't have anybody's name on it, there is no date on it, and ask him who of 100,000 employees of the company it refers to.

MR. TERLEP: I asked him if it applied to one of the severance payment recipients in this case.

He is testifying on behalf of the corporation and it seems to me that he should be qualified to answer that question.

MR. BENNETT: Answer it if you know.

THE WITNESS: I believe it did, yes. I believe it does.

BY MR. TERLEP:

Q To whom does it apply?

MR. SHARP: When you say "apply," you mean for which person was that calculation made?

There is an implication in your sentence, a question that—

BY MR. TERLEP:

Q In connection with the severance payment to which individual was this document prepared?

[31] A I believe that this was prepared in connection with the severance pay of T. K. Jones.

Q Did you prepare this document?
A I am not certain.
MR. FENDRICH: Can we go off the record for one second?

(Discussion off the record.)

MR. BENNETT: On the record.
What is the pending question?
(The last question and answer were read by the reporter.)
MR. BENNETT: Next question.

BY MR. TERLEP:

Q Do you know who prepared the document?
A Not for certain, no.
Q Was it in fact used by The Boeing Company in determining the amount of severance payment made to T. K. Jones?
A This or one very similar to it was.
Q. How would it be very similar to this document?
A I am just not certain that this was the final calculation that was utilized, because there is no name associated with it.
[32] Q Well, with regard to T. K. Jones, did Boeing consider any factor in determining the amount of severance payment to make to T. K. Jones that had to do with base rate differential between his government salary and that which he was receiving at The Boeing Company?
A Yes.
Q Was that base rate differential multiplied by a particular number of years?
A Yes.
Q Does the calculation on Exhiibt Number 8 reflect that factor under number one?
A You will have to clarify.
Q Under Roman numeral I.
A I guess I don't understand your question completely.

If you are asking whether or not I recognize $71,000 as being T. K. Jones' salary at The Boeing Company, I don't have a clear recollection of what his salary was at the time of the calculation, and therefore I can't verify that this applied necessarily to him.
Q Are you familiar with the calculations made or considered in determining the amount of severance payments to be made to each of the five individuals in this case?
[33] A Yes, sir.
Q How are you familiar with the calculations?
A I have been exposed to them over the years, at one point in time or another.
Q Is it a fair statement to say that with regard to each of those individuals, one factor considered by The Boeing Company in determining the amount of severance payment that would be made to each of those individuals had to do with the difference in his salary at Boeing and that which he would receive with the government over a specific period of time in the future?
MR. BENNETT: Now, wait a minute.
MS. BERMAN: Objection.
I would prefer you go individual by individual, as you know perfectly well there is an individual formula.
MR. TERLEP: I just asked him if it was a factor.
MR. BENNETT: Wait a minute. Wait a minute.
Are you talking about when he does workup where one of the people under his direction does a workup in the beginning of a case and do various calculations, when you say The Boeing Company? Or are you referring to the final decision? I mean, you are confusing—
[34] MR. TERLEP: He is testifying on behalf of the company.
MR. BENNETT: Well, he only knows what he knows. And I guess my point is you are equating—you are equating this unidentified, really, piece of paper with "the decision of The Boeing Company."

MR. TERLEP: All right, let's do it another way, Mr. Bennett.

Would you please mark this the original exhibit, whatever the next number is, Number 42. I don't have copies.

(Memo from Koester to Heyel, 1/5/81, was marked Plaintiff's Exhibit No. 42 for identification.)

(Document handed to witness)

MR. FENDRICH: The next number—
MR. BENNETT: This is Exhibit 42.

(Witness perused document)

Q Have you examined Exhibit 42, sir?
MR. BENNETT: Read the whole thing, please.
THE WITNESS (perusing document) Yes, I have seen this exhibit.

[35] BY MR. TERLEP:

Q What is it, sir?
A Just wait for a second.
MR. TERLEP: If you would like, I would provide you with copies of this after the deposition. I would like to substitute a copy for this original.
MR. BENNETT: Fine.
THE WITNESS: It is a letter from C. P. Koester to James Heyel, of the DCAA, subject to which is termination pay, with three attachments.

BY MR. TERLEP:

Q What severance payments were made or termination payments were made by The Boeing Company during the year 1981?
A I guess I don't have those committed to memory.
Q Is this an official document at The Boeing Company, official letter of The Boeing Company?
A As best I can ascertain.

Q Is that Boeing stationery?
A Yes.
Q Are the attachments Boeing documents?
A Not Boeing documents per se, but they appear to be working papers associated with workup of numbers for [36] evaluation and recommendation on severance pay.
Q Do you know who those attached pages are applicable to?
A I recognize one for certain.
Q Which is that?
A The one with a figure of $180,064 in the lower righthand corner as being applicable to Mel Paisley.
Q Was this document used by The Boeing Company in connection with its determination of the amount of severance payment to make to Mr. Paisley?
A Yes.
Q Do you recognize the handwriting on that document?
A I do.
Q Whose handwriting is that?
A Mine.
Q All of it?
A All of it.
Q Referring you to the bottom of that—
MR. BENNETT: Are you including numbers when you say handwriting?
MR. TERLEP: Yes.
THE WITNESS: Except for the red "F-1/4" is not mine.

[37] BY MR. TERLEP:

Q With regard to the other handwritten letters, cursive writing as well as the handwritten letters, all of that is yours?
A Yes.

Q When did you place your writing on that document?

A I don't recall.

Q Why did you place your writing on that document?

A It was done as a result of a request to actuarially reduce the typed figures shown on that page, to reflect the prepayment, if you will, or lump sum payment, with a 12 percent annual interest return on that amount.

Q Of what amount, sir?

A Of the amount as I indicated in typed—that are typed on this sheet.

Q Were the typed amounts the amounts that you had figured to be considered by The Boeing Company in connection with the severance payment to be paid to Mr. Paisley?

MR. SHARP: You personally, Mr. Hagberg?

MR. TERLEP: Yes.

THE WITNESS: I am not certain whether I personally calculated those figures, or whether they were submitted to [38] me from another source.

BY MR. TERLEP:

Q But a version of this document without the handwritten portion was presented to you at one time?

A Either presented to me or prepared by me, yes.

Q And it was considered by The Boeing Company in their determination of the severance payment to Mr. Paisley?

A Yes.

Q That is, the document without your handwriting?

A Yes, sir.

Q Who instructed you to make this actuarial reduction?

A My boss, Mr. Benson.

Q Do you know who instructed—if anyone instructed—him to do that?

A I believe he was instructed by Mr. Wilson to look at that approach.

Q Why, do you know?

A As an attempt to reduce the amount that was then being recommended, or considered.

Q Did you take each one of the typewritten factors and apply a specific formula to that?

A I didn't personally, no.

[39] Q Did you instruct somebody to do that?

A As I indicated earlier, it was turned over to our actuary, and a request was made of them to do that.

Q Did they make a report to you about how the typewritten numbers on this page should be reduced actuarially?

A An informal report, yes, which is reflected by the handwritten numbers on that sheet.

Q Was their report to you in writing?

A Yes, I am certain it must have been.

Q How did you get the figures that you had wrote down on this paper, did someone tell you what the figures were or did you copy from a piece of paper?

A No, I copied from a piece of paper.

Q You didn't prepare the piece of paper?

A No.

Q You didn't sit down with these figures and multiply these things out yourself?

A No, I did not.

Q Would you tell me how that formula works?

No. Are you familiar with the term "present value of future dollars"?

A Yes.

[40] Q Is that what this second figure represents, the figure in handwriting?

A I believe so.

Q How would one take—you can pick any figure that you want on here other than the relocation cost, because that doesn't appear to have been reduced in any way—can you explain how one gets from the typewritten figure to the handwritten figure?

A No, I am afraid I can't.

Q Formula?

What does 12 percent mean, the 12 percent return that is at the bottom of that page in your handwriting?

A It was an arbitrary value that was selected as being representative of the potential return on an investment that could be gained by a typical person.

Q Investment in a bank or—I mean, 12 percent just assumes that there is going to be a 12 percent return on the investment, is that correct?

A That is correct.

Q So is the figure compounded in any way?

A I don't know.

Q Let me see if I can give an example. I am not an [41] accountant and I am not versed in these things, but if I took one figure and multiplied it by 12 percent, the result of that multiplication would not be the figure that we are looking at here, is that correct?

MR. BENNETT: I object to that. I mean, you are not an accountant, so you shouldn't be asking the question, and he is not an accountant, so he shouldn't be answering.

MR. TERLEP: I am trying to figure out how this was derived, Mr. Bennett. And this man is speaking for The Boeing Company.

MR. BENNETT: Well, ask a proper question. Ask a proper question.

He can only answer what he knows.

What is the question?

MR. TERLEP: I think that he should be charged with having been prepared to answer these questions on behalf of the company.

MR. BENNETT: Would you repeat the last question.

(The pending question was read by the reporter.)

MR. BENNETT: Now, do you believe that any human being on the planet earth could answer that question?

MR. TERLEP: I don't know.

[42] MR. BENNETT: Well, I object and I ask you to rephrase it.

BY MR. TERLEP:

Q Mr. Hagberg, I direct your attention to the figure $156,600, which is listed under Roman numeral I on Exhibit Number 42, the last page of that exhibit, and I direct your attention to that figure, $156,600.

How does one arrive at the figure of $125,130, which is next to that figure?

A I don't have personal knowledge of how that number was arrived at.

Q I would like for you to supplement your deposition, when you get a chance to correct it on behalf of the corporation, to include an explanation of that.

MR. BENNETT: Well, you may liek it, Mr. Terlep, but he is going to answer questions that you ask of him today and if you ask questions that can't be answered, I don't view this as an open-ended deposition.

I mean, we can't even get the United States Government to make someone available tomorrow to testify on the general subject of severance payments, and you are complaining because he can't answer questions like these.

[43] MR. TERLEP: I would have expected him to come prepared to answer questions about how hs company, on whose behalf he is testifying today, arrived at the severance payment determinations made for these individuals.

MR. BENNETT: I think he is prepared to answer reasonable and sensible and logically relevant questions, and maybe you can fault the lawyers for the company for not preparing him on some of these questions, which are impossible to know you were going to be asking.

MR. TERLEP: Well, Mr. Bennett, these documents have been—these exhibits, many of them have been in your hands for many months.

MR. BENNETT: Vince, you asked the man, in fairness, about a piece of paper that was attached to a letter in 1981, and you ask him now to give you an explanation of how a number of $156,600, was reduced to $125,130, and he answers you, "I don't know."

You mean, you can't get blood out of a stone.

MR. TERLEP: As an individual I can understand his response. But he is not testifying here as an individual; he is testifying on behalf of The Boeing Company, and I believe that I am entitled to an answer of how that number was reached. [44] Whether it is as part of this deposition or as part of some supplemental submission made by The Boeing Company, I am entitled to know that.

MR. BENNETT: You ask the questions and he will answer them, and we do not agree that this is an open-ended deposition that will be supplemented.

BY MR. TERLEP:

Q Would you take a look at the second to the last page of Exhibit Number 42, and I ask you if you can identify that page?

A Again, it appears as a typical worksheet associated with the calculation of severance pay for one of the individuals.

Q Do you know whether this was used by The Boeing Company in determining the severance payment made to any of the individuals involved in this case?

MR. SHARP: You can only respond to that which you know.

THE WITNESS: Would you state your question again, please?

MR. TERLEP: Will the reporter reread it.

(The pending question was read by the reporter.)

[45] THE WITNESS: Yes, I believe it was.

BY MR. TERLEP:

Q To whom does it apply?

A Herb Reynolds.

Q Would you take a look at the next, the third from the last page on that document, and I pose the same question with regard to that document?

MR. BENNETT: Let him ask the question.

MR. TERLEP: Will the reporter read back the penultimate question?

(The penultimate question was reread by the reporter.)

THE WITNESS: Yes, I believe so.

BY MR. TERLEP:

Q To whom, in consideration of payment, to whom was this used?

A As I earlier indicated, I believe it is associated with T. K. Jones.

MR. TERLEP: 43.

(Memo from Koester to DCAA, Attention Sabado, 1/5/83, re termination pay, was marked Plaintiff's Exhibit No. 43 for identification.)

[46] MR. TERLEP: This likewise, counsel, is Exhibit Number 43 of which I do not have copies today, but I will provide copies to you.

(Document handed to witness)

BY MR. TERLEP:

Q I ask you, sir, can you identify that document?

MR. BENNETT: Will you identify the whole document? Becaue there are a couple of different things here.

THE WITNESS: Okay. The document is a letter from C. P. Koester to the Defense Contract Audit Agency, to the attention of Mr. R. Sabado, subject of which is "Terminal pay." And there are two attachments, one associated with terminal pay for Harold Kit-

son, and the other entitled "Terminal pay" for L. H. Crandon.

BY MR. TERLEP:

Q Is the first page of that document on Boeing letterhead?
A The first page?
Q Yes.
A Yes.
Q Is it an original signature on that document?
A Yes.
[47] Q Do you recognize Mr. Koester's signature?
A Yes, I do.
Q Is that his signature?
A Yes, it is.
Q I would pose to you the same questions that I posed to you with regard to the attachments to Exhibit Number 42, with regard to the two attachments to this letter; namely, starting with the second page of this exhibit, was that document prepared in connection with the consideration of the severance payment made to Mr. Kitson? I should say consideration by The Boeing Company.
A I believe so.
Q There is handwriting on that page, is there not?
A Yes.
Q Do you recognize that handwriting?
A No, I don't.
Q Have you ever seen that document before?
A Yes, I have.
Q When did you see it?
A I believe I Saw it yesterday, did I not? (Laughing)
Q Did you see that document before yesterday?
A I don't have a recollection of seeing it before [48] yesterday.
Q Did you play any role in the recommendation, approval, or consideration of any severance payment made by The Boeing Company to Mr. Kitson?

MR. SHARP: Just to make the record, is he testifying as a witness from Boeing now?
MR. TERLEP: We did notice him as both.
MR. SHARP: Okay, I just wanted to know how much you were going to protest.
THE WITNESS: I don't have a personal recollection of the detailed association with Mr. Kitson's terminal pay amount.

BY MR. TERLEP:

Q I guess when you use the word "detailed," it makes me ask another question, whether you had any involvement of that sort with Mr. Kitson's determination?
A I don't recall the extent, if any, of my personal involvement with Kitson's terminal pay calculation.
Q Do you recall seeing this document in 1982?
MR. BENNETT: I believe he has testified he thinks he saw it yesterday and doesn't think he saw it before then.
MR. TERLEP: I don't think he said the latter phrase.
[49] MR. BENNETT: All right, answer the question.
THE WITNESS: Do I recall seeing it in '82?

BY MR. TERLEP:

Q Yes.
A No, I don't recall seeing it in '82.
Q Would you take a look at the last page of that document. Is this a document that was used by The Boeing Company in consideration of the severance payment made by Mr. Crandon?
A Yes, I believe it is.
Q Have you seen this document before today?
A Yes.
Q When did you last see it?
A I don't recall now.
Q Was it yesterday?
A I believe I saw it yesterday, but I have seen it prior to that as well.

Q Did you have a role, any role at all, in the consideration of the severance payment made to Mr. Crandon?

A Yes.

Q What was that?

A I either verified the numbers that appear on this [50] page, or I was involved in the workup of them.

Q With regard to the severance payments made to all of the individual defendants involved in this case, except for MR. Paisley, do you know whether there was a factor applied similar to that that was applied to Mr. Paisley having to do with actuarial reduction?

MR. BENNETT: I object to the form of the question. I don't understand the question.

BY MR. TERLEP:

Q Does the witness understand the question?

A Is your question do I know whether or not there was—

MR. BENNETT: Would you read the question back?

(The pertinent question was read by the reporter.)

MR. BENNETT: Can you rephrase that? I mean, that is just—well, okay.

THE WITNESS: I can answer, I was not personally involved in the application of a factor associated with actuarial reduction on any of the other defendants.

BY MR. TERLEP:

Q Was it the company's practice to include that as a factor in determining the amount?

[51] A No.

Q Was the use of actuarial reduction unique to the computation regarding Mr. Paisley?

A I believe it was, yes.

Q Now, Boeing severance payments practice, would you call what Boeing does with regard to severance payments a practice or a policy?

A I think it is more correctly called a practice.

Q Is the practice embodied in any writing?

Let me break the question down. Prior to the time that the severance payments were made to Mr. Kitson and Mr. Crandon, was there anything in writing which describes Boeing's severance payments—policy—or practice? I am sorry.

A Yes. There was. There was.

Q What was that?

A There was a letter signed by Stan Little to a number of senior vice presidents proposing two alternate approaches to severance pay and asking for their comments.

Q I hand you what has been marked previously as Exhibit 28 and ask you if that is a copy of the letter to which you just referred? Or the memo. (Handing document to witness)

A Yes.

[52] Q Just for the sake of continuity here, would you take a look at Exhibit 29 and I ask you if you can identify that document? (Handing document to witness)

A (Perusing document) Did you ask a question regarding this?

Q Yes. Can you identify that document?

MR. FENDRICH: As being one or both of those?

MR. TERLEP: No, I asked him about 29.

MR. BENNETT: 29.

THE WITNESS: It appears to be a draft of an internal operating procedure preceding a similar writing that was attached to a letter that I have just referred to.

BY MR. TERLEP:

Q You believe that 29 is a draft of that which is attached to Number 28, is that correct?

A I believe that is true, yes.

Q Now, is Exhibit Number 28 the first writing that exists with regard to Boeing severance payments practice?

MR. BENNETT: Well, you know, I am going to let him answer, but I object to the form, because, you know, it is such a generic question. "Writing" is such a general term.

MR. TERLEP: Well, the documents—

[53] MR. BENNETT: If the question is does he know of any other documents precisely like this, that is one thing. But any writing about—I mean it is a very—

MR. TERLEP: One of the issues in this case is whether or not Boeing's severance payments policy or practice, or whatever you want to call it, is something that is embodied in any kind of writing, and that's what I am trying to get at.

MR. BENNETT: Well, would you mind rephrasing the question? Maybe he understands it.

BY MR. TERLEP:

Q To your knowledge was Boeing's severance payment policy or practice embodied in any kind of writing at any time?

MR. BENNETT: He answered the question that he thought Mr. Little—you have given Little's and he has identified it and he has identified another exhibit. Is there anything else?

BY MR. TERLEP:

Q Is this the only writing that embodies the Boeing present severance practice?

A It's the only one that I am aware of, yes.

Q As an individual or as a person testifying on behalf [54] of the company?

A Both.

Q Was it Boeing's practice to inform its employees of the possibility of receiving severance payments?

MR. BENNETT: What do you mean, "employees"? They have 100,000 employees. Do you mean all of them?

MR. TERLEP: Any.

THE WITNESS: We did not have a stated practice of advertising that we had a severance pay policy to our employees.

BY MR. TERLEP:

Q How did the employee learn that he might receive a severance payment?

A I guess it could have been any number of sources, word of mouth being the first and foremost one.

Q With regard to any of the individuals that are defendants in this case, did The Boeing Company request any of them to submit, either orally or in writing, the employee's views about what Boeing might consider in determining the amount of severance payment to be made to them?

MR. FENDRICH: Would you repeat the question?

[55] MR. TERLEP: The reporter can read it.

MR. FENDRICH: It is rather long.

(The pending question was read by the reporter.)

MR. BENNETT: Now let me just ask you this, when you say "The Boeing Company," are you talking about individuals in the company, Industrial Relations, or what is "The Boeing Company"?

THE WITNESS: I am having a little trouble with that.

MR. TERLEP: "The Boeing Company" is anyone at The Boeing Company.

MR. BENNETT: Excuse me. What did you say?

THE WITNESS: I was having a little trouble with what you meant by "The Boeing Company" as well.

BY MR. TERLEP:

Q Anyone at The Boeing Company.

A I don't know.

Q Personally you don't know? From your own recollection you don't know?

A Correct.

Q On behalf of The Boeing Company do you know?

A No. I just don't know.

MR. TERLEP: I wonder if I could just take a break [56] for a second?

MR. BENNETT: Sure.

(Whereupon, a short recess was taken.)

MR. TERLEP: Can we go back on the record.

Counsel, I wonder if we could agree to the stipulation about the attachments to the documents that were exhibits?

MR. BENNETT: 28 and 29?

MR. TERLEP: No, I am sorry, up in the 40's, 43 and 42.

These attachments were the source of my copies of documents that I have used in the past, last week, and variously numbered throughout here. We can stipulate that those are indeed copies of the attachments to these two documents? In particular, for instance, Exhibit Number 12 is, I think, the last page of Exhibit Number 42, et cetera.

MR. SHARP: Mr. Terlep, for the record, you have marked as exhibits before at least two documents that I have, Exhibits 13 and 19, which appear on their face to be virtually identical form of calculation sheets for which different numbers are derived.

We received testimony from four people about those figures. Now you are asking us to do what with respect to [57] different figures here?

MR. TERLEP: No different figures at all.

MR. SHARP: Certainly they are different figures.

MS. BERMAN: Let me ask you, why don't you tell us which of the previously marked exhibits you believe correspond to which page of the attachment, and we can look at it.

MR. SHARP: I am talking about exhibits which are unidentified calculation sheets, just as the ones you are referring to, that derived different numbers and values than the ones that you are referring to, and I am asking you what it is that you intend to try to stipulate?

MR. TERLEP: I don't want to stipulate anything with regards to those documents that you are looking at. I am specifically looking at the attachments to 42 and 43. You can talk about those documents in a minute.

MR. SHARP: What do you want to stipulate with respect to those, that they are attachments?

MR. TERLEP: No, that they are the same as the exhibits that we had previously marked—I will give you an example. Exhibit Number 12, that we marked and used last week in the deposition, is a copy of the document that is the third page or the last page of Exhibit Number 42.

[58] MR. BENNETT: Look, let me tell you what I think my position is on this. There is no need to stipulate to these kinds of things. If you have marked something as an exhibit earlier in this case, it speaks for itself. And if you hold up exhibit X number and compare it to exhibit Y number, they are either the same or they are not the same.

But I am very hesitant to stipulate, because I don't know where you are going.

The exhibits are the exhibits.

MR. BENNETT: If you want to show two different exhibits with two different numbers and ask him if they are the same, then obviously he will answer the question.

MR. TERLEP: Okay, we can. That's what I was triyng to avoid, going through that, but if you insist on doing that, I will do that.

MR. FENDRICH: By the way, I will mention at least some of these exhibits you just introduced actually constitute exhibits to defendants' joint requests for admissions that were served upon the government and to which responses I believe were supplied.

MR. TERLEP: Right.

MR. FENDRICH: So I think that we represented that [59] some of these same documents represent certain documents that Boeing tendered to DCAA, and I think we have asked the government to concur in our authentication.

MR. TERLEP: Well, as long as we can have a stipulation by everybody that I can use those documents for my own purposes as authenticated.

The way I understand the application of Rule 36, when a party asks another party to authenticate a document, the party asking is entitled to use it, but not the party authenticating's entitled to use it.

If you will stipulate that I can use it just as you can use it, then I'm fine.

MR. BENNETT: I don't know what I am being asked to do.

What are you asking me to do?

MR. TERLEP: Mr. Fendrich just brought up that many of these documents that we used as exhibits and as we have been talking about today were indeed attached to the request for admissions that were served upon the government, the joint request for admissions by all parties, and we were asked to stipulate or to admit their authenticity.

My understanding of Rule 36 of the Rules of Civil [60] Procedure is that when an individual, when a party does that, the party asking for the admission may use them for any purpose. But the party who is asked is not so privileged.

If you would like to stipulate we can use them that way, I will be more than happy to stipulate to that.

MR. BENNETT: I don't know what I am stipulating or not stipulating.

Why don't you just ask him questions and we will let him answer.

I honest to heavens don't know what I am being asked to stipulate to.

MR. TERLEP: Let me try to make it clear, that if you presented a document to us to admit the authenticity of that document as what it appears to be on its face, can we rely on it as an admission by the parties that the document is what it is purported to be.

MR. FENDRICH: I suggest that since we don't have the request to admit in front of us, nor the attachments thereto, we had better defer that question for another time.

MR. TERLEP: Okay. I would like to do that, but that is what is causing me to go through this arduous procedure.

MR. BENNETT: In the Eastern District of Virginia, [61] we are going to have to identify documents in time for pretrial.

MR. TERLEP: Yes.

MR. BENNETT: And each side then, not withstanding the rule, the way the rule's written, will be given a short period of time to object to the other side's exhibits, either on the grounds of authenticity or relevancy or hearsay.

Why can't that solve the problem?

MR. TERLEP: Well, because by the time that happens—

MR. BENNETT: This is not the time to be doing that.

MR. TERLEP: Well, he is The Boeing Company.

MR. BENNETT: He is not The Boeing Company.

You can't—it's a 30(b)(6). He is Boeing's representative here at this deposition to answer questions on behalf of the company. But there are obviously limitations that he can only answer what he knows and what he has knowledge of.

MR. TERLEP: Well, unfortunately the discovery period will be over by the time we are required to make our admission or our stipulations as to documents.

I need to protect myself with regard to these [62] documents. I can't rely on the hope of your stipulation to the authenticity of documents.

MR. FENDRICH: May I just ask you why you didn't "protect" yourself, to use your phrase, by introducing the exhibits which you now want to assure us were previously marked and identified, and which are also attachments to these letters that you have introduced today? Why didn't you introduce them by their exhibit numbers?

MR. TERLEP: Well, because they were attached to this letter (indicating), and they weren't so attached as the exhibit.

I am going to go through these exhibits and I will do what Mr. Bennett has suggested that I do.

MS. BERMAN: There are only five of them.

MR. BENNETT: Ask the witness some questions and let's get on with this.

MR. TERLEP: Okay. Let's go.

BY MR. TERLEP:

Q I will hand you what has been marked as Exhibit Number 7 and ask you if you can identify that document?

(Handing document to witness)

MR. BENNETT: Previously marked as Exhibit 7 [63] in another deposition.

MR. TERLEP: That is right.

MR. BENNETT: What is the question on Exhibit Number 7?

MR. TERLEP: I am asking him if he can identify the document?

(Witness conferred with counsel)

THE WITNESS: Okay, this appears to be a letter from Bud Hebeler to Clyde Skeen, subject of which is

"Termination agreement between The Boeing Company and Thomas K. Jones."

BY MR. TERLEP:

Q Was this document used by The Boeing Company in connection with its determination to make a severance payment to Mr. Jones?

MR. SHARP: Let me object to the use of the phrase "The Boeing Company," again. It is very unclear as to whom you are referring.

Are you referring to the Chief Executive Officer, to Mr. Hagberg himself? To someone in the Boeing Aerospace Company, to Mr. Hebeler, to Mr. Skeen?

MR. TERLEP: My question is with regard to The Boeing Company henceforth, and until otherwise qualified, will mean [64] to anyone in The Boeing Company.

MR. SHARP: Did anyone in The Boeing Company consider this document? Fine.

MR. TERLEP: In connection with the determination of severance payment to Mr. Jones.

MR. BENNETT: Well, I guess—see, the problem is one of semantics maybe.

A certain person in the company makes a decision. And are you asking him whether Mr. Wilson, or whoever made the decision, whether he considered this letter or not?

MR. TERLEP: I am asking—

MR. BENNETT: Is that the question?

MR. TERLEP: —whether on behalf of The Boeing Company, he is speaking on behalf of The Boeing Company, whether this document was used by the company in its determi..ation of the severance payment to be made to T. K. Jones.

MR. BENNETT: Answer the question if you can.

THE WITNESS: I believe this or similar doucment was indeed used.

MR. FENDRICH: I think the problem goes back further, really, than the one that you mentioned, Mr. Bennett; that is, when Mr. Terlep asked you—

[65] (Counsel conferred with witness)

MR. BENNETT: I think we have clarified.

MR. FENDRICH: As I was saying, I think the problem goes deeper, Mr. Hagberg, and it goes back to the fact that when Mr. Terlep asked you if you could identify the document, you said "It appears to be," and then you apparently read from the face of the document, it was so-and-so, and re so-and-so.

And the question, "Can you identify it," usually means can you, aside from reading the document, say that you recognize—

MR. BENNETT: He answered the way his counsel instructed him.

MR. FENDRICH: Oh.

MR. BENNETT: I appreciate your problem, but let's go ahead and get on with this nonsense.

BY MR. TERLEP:

Q What is the document?

A What is it?

Q Yes.

A It is a letter from H. K. Hebeler to C. E. Skeen.

Q Do you know if this document was used by The [66] Boeing Company in connection with its consideration of the payment to T. K. Jones?

A This letter or similar one was used by my office and by Stan Little for consideration of the terminal pay or severance pay for T. K. Jones, yes.

Q Do you know who prepared this letter?

A No.

Q Or this memorandum, rather?

A No, I don't.

Q Do you know which office within Boeing might have prepared this document?

A I can stipulate that it was—I can give you my opinion.

Q Okay.

A That it was likely prepared by Industrial Relations organization of the Boeing Aerospace Corporation.

Q Have you seen this document before today?

A Yes.

Q When did you last see it?

A When did I last see it?

Q Yes.

A I believe I saw it yesterday.

[67] Q When did you see it for the first time?

A I can't recall specifically.

Q Did you see it in connection with the company's consideration—in your official duties in connection with your company's consideration of severance payment for T. K. Jones?

A Yes.

Q Did it have Mr. Hebeler's signature on it at that time?

A Yes.

Q Did it have any other signature on this document when you saw it?

A I have seen this or a similar letter with other signatures on it, but I can't stipulate that they are identical.

Q There are places for signature or for initial on the second page of Exhibit Number 7 for C. E. Skeen and a number of other individuals.

Did you see the signatures or initials of any other individuals, any of the individuals listed on page 2 of this document, or one like it?

A Yes.

[68] Q Whose signatures do you recall or initials do you recall seeing?

A I don't recall for certain whose names or who all signed, if any or all of them signed.

I know there were at least one or two signatures, but I can't stipulate for certain which they were.

Q Do you know whether Mr. Jones expressed his intention to anyone in The Boeing Company that he would like to return to The Boeing Company after completing his government service?

A No, I don't know.

Q I direct your attention to the numbered paragraphs on Exhibit Number 7. I Ask you to review those numbered paragraphs.

A (Perusing document) Okay.

Q When individuals resign or retire from The Boeing Company for any reason other than going to join the Federal Government, is it Boeing's practice to list considerations which might be considered at the time an employee is rehired by the company?

A No, not normally.

Q Is listing them in Exhibit Number 7 an unusual [69] practice to your mind?

MR. BENNETT: Well, I object.

Go ahead and answer over my objection, but—I mean I suppose it is unusual when people return to the company. I mean, I don't know what those words mean and I object to them.

MR. TERLEP: Well, if the witness understands the question, he can answer.

MR. BENNETT: Go ahead, over my objection.

THE WITNESS: It is not unusual as it relates to employees responding to a request to go to work for the government.

BY MR. TERLEP:

Q Hy?

A I don't know why.

Q Why is it not unusual?

MR. SHARP: He just answered that question, Vince. Come on. He said he didn't know why. Now you are asking the same question all over again.

MR. TERLEP: I was afraid that he didn't understand the question. He has made a statement, statement of fact.

MR. BENNETT: Let's go on to the next question. He said he didn't know why.

[70] BY MR. TERLEP:

Q Did you understand my question?

A As to why it was not unusual?

Q Yes.

A As I understand that. I don't know why it is not unusual.

Q Has The Boeing Company put down in writing considerations that are listed on the numbered paragraphs that are in Exhibit 7 as factors which should be considered if and when a person returns to the government —or returns to Boeing for any individual other than those receiving severance payments?

A Can you explain what you mean by "The Boeing Company"?

Again, you are talking about a very large organization.

Q Yes, I am.

A Can you explain what you mean?

Do you mean any individual in the company, has any individual ever requested consideration of this?

Q No. Has The Boeing Company ever listed in writing the considerations that should be taken into account when someone returns to The Boeing Company for people other than those [71] receiving severance payments?

A No, I don't believe so.

Q Would you say that putting such considerations in writing was unique to individuals receiving severance pay?

MR. SHARP: Do you want to ask him whether they put anything in writing when someone leaves for another purpose?

You are calling it an unusual but you are comparing it to nothing else. It is like saying is it unusual to fly an airplane as it is to play baseball, or something. It is a completely nonsensical comparison.

MR. TERLEP: I asked him if it was unusual when people leave The Boeing Company to list considerations to be taken into account when someone is rehired.

MR. FENDRICH: The document says—

MR. SHARP: Why don't you ask if it is unusual to write a document when someone leaves The Boeing Company.

MR. FENDRICH: This document says "if and when."

MR. TERLEP: That is correct.

MR. SHARP: You keep leaving out the "if."

MR. TERLEP: Fine, I will bring that into my question.

I will ask Mr. Sharp's question.

[72] BY MR. TERLEP:

Q Is it usual for The Boeing Company to draft a document when people resign or retire from The Boeing Company which lists the considerations to be taken into account if and when they return?

A No.

Q Do you know if a document which would include a listing of those considerations is unique to those individuals receiving severance payments?

MR. BENNETT: I object to the word "unique," and I will let him answer over my objection.

THE WITNESS: Your question was do I know if it is unique? And my answer is no, I don't know if it is unique for those receiving severance pay.

BY MR. TERLEP:

Q Is Boeing's severance payment practice limited to individuals who leave The Boeing Company to go to work for the Federal Government?

MR. BENNETT: You are talking about as of this time? Because—

MR. TERLEP: I'm sorry.

MR. TERLEP:—their practice has been not to give [73] severance payments for quite sometime. At what point in time are you talking about?

BY MR. TERLEP:

Q During the time that the severance payments were made to the five individual defendants involved in this case, was it Boeing's practice to limit severance payments solely to individuals going to work for the Federal Government?

A I guess I would say we didn't have a practice which limited severance payments to employees going to work for the government, but to my knowledge, during that time period, the only people who received such payments were people who did indeed go to work for the government.

Q Did Boeing make severance payments to any individual at any time prior to that time that did not leave Boeing to go to work for the Federal Government?

MR. BENNETT: I am sorry, would you read that question?

(The pending question was read by the reporter.)

BY MR. TERLEP:

Q Did you understand the question, sir?

A Yes. To my knowledge, severance payment was provided only to those people who were required to sever their [74] relationship with the company, to go to work for a government agency, and therefore was limited to those going to work for the Federal Government.

There were some employees who went to work for other government agencies, st..te and/or local government, who were not required to sever their relationship with the company, and therefore did not receive severance pay.

Q Were these employees who went to work for state and local governments required to terminate their employment at The Boeing Company?

A Typically they were placed on leave of absence, rather than terminate their employment.

Q So they did not resign or retire?

A That is correct.

Q Were they part-time Boeing employees, any of them that you can recall?

A Yes.

Q Let me finish the question, to be fair.

A All right.

Q During the time that they served as employees of a state or local government?

A Yes, we have a few employees who work part time [75] in the state legislature and part time at The Boeing Company, that kind of relationship.

Q Are severance payments made to these individuals?

A No, sir.

Q Does Boeing make severance payments to individuals who resign or retire from Boeing to serve in any academic institution?

A Not to my knowledge.

Q Does Boeing make—

MR. SHARP: The question is do they or have they? Would they or did they?

BY MR. TERLEP:

Q Prior to the date that the last severance payment was made in this case, was it Boeing's practice or policy to make severance payments to individuals leaving Boeing, resigning or retiring from Boeing, to take positions in academic institutions?

A I don't believe the request had ever been made, and therefore none had ever been accepted or rejectd to my knowlege.

Q I would ask you the same long question with regard [76] to individuals who may have entered the ministry or the clergy?

A I guess the same long answer would apply.

MR. SHARP: How about heads of foreign governments?

MR. TERLEP: There is method to my madness, Mr. Sharp.

MR. SHARP: Symphony conductors?

MR. BENNETT: Let's get on with this.

MR. TERLEP: And you know why I am asking these questions.

MR. SHARP: No, I don't, and I guess I don't care to know, Vince.

BY MR. TERLEP:

Q I will hand you what was marked as Exhibit—do you have exhibit 8?

A Yes, I do have it. I am sorry.

Q Sir, is Exhibit 8 the same as that that is the third page of Exhibit Number 42?

MR. BENNETT: The documents speak for themselves.

MR. TERLEP: You suggested this method, Mr. Bennett.

THE WITNESS: The third page or third attachment?

BY MR. TERLEP:

Q The third page—I am sorry, the third page of the [77] attachment. You are quite right, sir.

A Are they the same? No, they are not.

MR. TERLEP: Let me see if I can see from this side of the table.

MR. BENNETT: This is why I wouldn't stipulate.

BY MR. TERLEP:

Q It is the first page of the attachment.

MR. BENNETT: Now, what is the question?

BY MR. TERLEP:

Q Is Exhibit Number 8 the same document as that which is attached to—

A You know—

MR. BENNETT: Wait a minute. Wait a minute. You see, my problem is I don't know what you mean by the word "same."

For example, one says "Limited," one says "Boeing Limited."

One has a red entry on the bottom right, the other does not.

On the other hand, there are a lot of words that are identical and a lot of numbers that are identical.

MR. TERLEP: All right, we will leave it at that. [78] I have to also state for the record that I am seeing this comparison right now from my side of the table, and my recollection was that I copied Exhibit 8. I made representation earlier today that the copy was made the same.

I thought that I had copied Number 8 from Exhibit Number 42, but I had not.

THE WITNESS: I don't believe you did.

MR. TERLEP: I must have gotten another source.

MR. BENNETT: And that is the reason why we did not stipulate was not to make things difficult, but this kind of thing—

MR. TERLEP: I understand. Okay.

(Discussion off the record.)

BY MR. TERLEP:

Q I will hand you what was remarked as Exhibit Number 9—(handing document to witness)—and ask you if you have seen this document before today ?

A (Perusing document) Yes, I have seen this.

Q When did you first see it?

A Sometime in 1981.

Q In May of 1981?

MR. BENNETT: He said "sometime in 1981."

[79] MR. TERLEP: I am asking if the "sometime" was in May 1981.

THE WITNESS: It's likely it was in May.

BY MR. TERLEP:

Q Was it in consideration with the determination of the severance payment made to Mr. Jones?

MR. BENNETT: Wait a minute. Wait a minute. I object. That is an unfair question.

MR. TERLEP: How is it unfair?

MR. BENNETT: You are linking two different things together.

MR. TERLEP: What am I linking together?

MR. BENNETT: Would you please repeat the question?

Listen carefully to the question.

(The pending question was read by the reporter.)

MR. TERLEP: I should say in connection with the consideration of the severance payment made to Mr. Jones.

MR. BENNETT: I think that makes a big difference.

THE WITNESS: Yes, it was in connection with the severance pay letter.

BY MR. TERLEP:

Q How was it in connection? How was your review of it [80] in connection with that determination?

A It is merely an explanation from Mr. Hebeler to his boss of why he felt the large number was supportable.

Q Did you see this after the company had made the determination to make a severance payment to Mr. Jones, or before?

A I don't recall.

Q Was it a part of a package that you may have received after the final decision was made, or was it in draft on its way up to whoever made the final decision?

MR. BENNETT: If you know.

THE WITNESS: I just don't know.

BY MR. TERLEP:

Q Okay, I will ask you to look at Number 10. (Handing document to witness)

A (Perusing document)

Q Have you seen that document before today, sir?

A Yes.

Q When was the first time that you saw that document?

A Sometime in 1981.

Q Would that sometime have been in May of 1981?

A Likely.

[81] Q Did you see it at the same time you saw Exhibit Number 9?

A I don't recall.

Q Who is P. C. Hisken?

A He was an Industrial Relations supervisor assigned to Boeing Aerospace Company.

Q Who was Paul Turner?

A Another Industrial Relations supervisor assigned to the Boeing Aerospace Company.

Q Mr. Landon?

A The same.

Q Mr. Smith?

A The same.

Q Do you know what roles they played in connection with the company's consideration of severance payment made to Mr. Jones?

A No, I don't.

Q Did you ever see any document prepared by Mr. Jones which may have summarized the financial impact that leaving Boeing would have or that accepting a government position would have on him?

A I believe so, but I don't have a clear recollection.

[82] Q You believe that you saw such a document?

A Yes.

Q You don't have a recollection as to the content of the document?

A No.

Q Do you remember when you saw the document?

A No.

Q Do you remember whether it was around the time that you saw Exhibit Number 9 or Exhibit Number 10?

A No, I don't.

Q Do you know whether it was before the company made its determination to make a severance payment to Mr. Jones?

A No, I don't.

Q Do you know the chain of approval that a decision to make severance payment to an individual needs to go through from the lowest to the highest person who needs to approve that?

A Generally, yes.

Q Can you describe that for us? I am talking about during the time that the payments were made to the individuals involved in this case.

A Well, typically a request was initiated by management [83] of the affected individual. In these particular cases, I believe those were all Boeing Aerospace Company management.

Q Who would be management?

A The supervision of the individuals involved, either direct supervisors of those people or their bosses, or some echelon above that. Typically the request letter was signed by the President of the Boeing Aerospace Company.

Q Request to whom?

A Request to—if I recall correctly, I believe those requests were addressed to Clyde Skeen, who was in the chain of command. He was a corporate vice president who was Bud Hebeler's boss, he was Mark Miller's boss.

Q What was Mark Miller's job at that time? Was he under Mr. Hebeler?

A Yes, he was.

Q Correct me if I am wrong on this, then, the recommendation would come from someone inside the operating company to a superior of his, perhaps to Mr. Miller—is that correct—or to Mr. Hebeler?

A Yes.

Q Would it be your requirement that it would go to both of those individuals?

[84] A Only insofar as the person were in Mark Miller's chain of command. It might not have gone to Mark Miller.

Q What do you mean by chain of command?

A Well, Mr. Hebeler had several immediate subordinates, I believe, at that point in time, and one of whom was Mark Miller. And if the request were associated with an employee who worked within Mark Miller's organization, yes, it would have gone through him.

If, on the other hand, it was an employee who was in some other element of the Boeing Aerospace Company, it would not—it would probably not have gone through Mark Miller.

Q Do you know whether any of the individuals which are involved in this case were of components that did not report to Mr. Miller?

A I don't know that.

Q Who would the other individuals be, vice presidents at the same level as Mr. Miller?

A Yes. There would have been organizationally peers of Mark Miller. They may or may not have been vice presidents.

Q I see. And then it would have gone to Mr. Hebeler?

A Correct.

Q To where would it go from Mr. Hebeler?

[85] A To Clyde Skeen.

Q What was his position?

A I don't recall his exact title, but he was, in essence

a group vice president in charge of all the military or organizations doing government work.

Q This is at the corporate level, not at the Boeing Aerospace level?

A Correct, corporate level.

Q And from there where would it go?

A Ultimately to Mr. Wilson for his review and approval through—generally through my office or Corporate Compensation Office, and through Stan Little, the Vice President of Industrial and Public Relations.

Q And then it would go on to Mr. Wilson?

A Correct.

Q Would Mr. Albrecht be a part of the chain of approval?

A He was often, at least he was sometimes involved in the concurrence of the request.

Q As a manager or as a lawyer?

A As a lawyer.

Q Did the Office of Corporate Compensation at the corporate level have any role in making the initial [86] determination, or the initial recommendation with regard to severance payments?

A The initial?

Q Yes.

A No, ours was a staff capacity to ascertain conformance with the approach and to verify the values that were submitted.

Q Were any of the documents prepared in connection with the determination of severance payments made to the five individuals in this case prepared at the corporate level, as opposed to the operating level?

A I guess I don't understand the question.

I did prepare some calculations, but I don't believe in any instance that they were the initial calculations.

Q This was in your capacity as Assistant Director of Corporate Compensation?

A Yes.

Q At the corporate level?
A Right.
Q But those calculations that you just testified to are not the same as the calculations or the documents that—any of the documents that we have referred to today?
[87] A They may or may not have been the same. I can't really testify to that.
Q Were they similar in any way to any of the computations, for instance, that were attached to Exhibit Number 42?
A Yes.
Q And number 43?
A Yes.
Q Why were computations similar to these prepared prior to your preparing them? In other words, at the operating company level, and then you changed them when you drafted them? Or—
A No, typically after—after I prepared that initial approach, we shared that with Industrial Relations Organizations of the Boeing Aerospace Company and indicated that that was the desired format for them to follow. And in subsequent considerations, they did indeed follow that format and conducted calculations and forwarded them. Typically my role was to verify those calculations, to verify the numbers, to ensure their accuracy. And I performed calculations in so doing.
Q Do you know—I will give you an example. If the calculation, such as that which is in Exhibit 12, which is also contained at the end, the last paragraph—you can [88] look at Exhibit 12 if you like, rather than looking at 42. Sorry.
I thought that you had it earlier.
I will hand you Exhibit Number 12. Do you know to whom this calculation applies? (Handing document to witness)
A Yes.
Q To whom?
A A Mr. Paisley.

Q Now, Mr. Paisley received a severance payment in the amount of $180,000?
MR. BENNETT: I don't think that is accurate.
THE WITNESS: I believe that is inaccurate.

BY MR. TERLEP:

Q It is inaccurate?
A Yes.
Q What was the amount of the severance payment?
A I believe it was $183,000.
Q Did the severance payment made to Mr. Paisley have any—did the computation of that severance payment have anything to do with his consultancy?
A Yes. In part.
Q What did it have to do with his consultancy?
[89] A I believe he had a conversation with Mr. Little, indicating that his loss was increased due to the stretch out of the confirmation process, and requested consideration for an increase in his severance pay from $180,000 to $183,000.
Q Was the figure $3,000 mentioned in that conversation? If you know.
A I believe it was.
Q Exactly $3,000?
A Well—
MR. BENNETT: Were you a party to that conversation?
THE WITNESS: I wasn't party to that conversation, so I can't answer that.
MR. BENNETT: Okay.

BY MR. TERLEP:

Q One of the things that I am trying to get you—perhaps I picked the wrong exhibit—was there any rounding of figures done or used, method of rounding to reach the amount of severance payment to be made to an individual?
A Yes.
Q And how was that rounding applied?
A At the sole discretion of Mr. Wilson.

[90] Sometimes he rounded up; sometimes he rounded down.

Q In what way? By dollars? tens of dollars? hundreds of dollars? thousands of dollars?

A Yes.

Q Which of those that I mentioned?

A I believe all of them.

Q All of them?

A Yes.

Q But the rounding was at his discretion?

A Yes.

Q Not at yours?

A Yes.

Q I see. Do you know whether his rounding was based upon the figures that you had provided to him pursuant to the formulation or the recommendation, or whatever we have called it throughout this deposition?

A I don't know that I can say it was pursuant to. It was with at least knowledge of our recommendation or our calculations.

Q With regard to all of the factors, or just with regard to the bottom line number?

[91] A I can't answer to what detail he was familiar with those numbers.

Q Do you know whether Mr. Wilson ever saw calculations such as are in Exhibit Number 12?

A I don't know.

Q I will hand you what is Exhibit Number 11 and ask you if you have ever seen that document? (Handing document to witness)

A (Perusing document) Yes, I have seen this.

Q When did you first see it?

A Sometime in 1981.

Q Did you see it around the time that you first saw Exhibits Numbers 9 and 10?

A It was subsequent to that time.

Q What makes you think it was subsequent to that time?

A I recall it being a draft sent to myself and my boss by Pete Hisken for our review and approval, prior to it being offered to Bud Hedeler for signature and presentation to Jones.

Q Do you recognize the handwriting on Exhibit Number 11?

[92] MR. BENNETT: You mean draft?

THE WITNESS: No, I don't.

BY MR. TERLEP:

Q You don't know whether that is Mr. Hisken's handwriting or not?

A No, I can't say.

Q That is not your handwriting?

A No.

Q All right. Do you know whether a letter was ever sent to Mr. Jones informing him of the fact that he was going to receive a severance payment? Was it ever sent to him?

A No, I don't know.

Q Now, you have Exhibit Number 12?

A Yes.

Q Exhibit Number 13—

MR. TERLEP: Madam Reporter, I need 13 through 16, that were marked this morning.

BY MR. TERLEP:

Q I hand you Exhibit Number 13 and ask you if you have seen that document before? (Handing document to witness)

A (Perusing document) Yes.

Q When did you first see it?

[93] A I don't recall specifically.

Q What makes you believe that you saw it before?

A It looks like one of several working pieces of paper

that were prepared in connection with consideration of terminal pay for Mr. Paisley.

Q Was it prepared before or after Exhibit Number 12 was prepared?

A I believe it was prepared after the time of Exhibit 12.

Q Do you know why the figure 3½ years was used?

A I believe it was used because of the passage of time, from the initial—from Exhibit 12's workup.

Q Now, on Exhibit Number 13, under Roman numeral II, there does not appear to be an entry that relates to any forfeiture of past company contributions to the voluntary investment program, is that correct?

A That is correct.

Q There does appear to be such an entry on Exhibit Number 12, does there not?

A Yes.

Q Do you know why that was deleted from Exhibit Number 13?

[94] A No, I am afraid I don't.

Oh.

MR. BENNETT: Do you know or don't you?

THE WITNESS: Yes, I guess I do know.

MR. BENNETT: Now he is entitled to it if you know. But I don't want you guessing.

THE WITNESS: It is because there is no forfeiture. Exhibit Number 13 assumes that he severed his relationship with the company due to retirement. Exhibit 12 does not assume retirement, and there is no forfeiture of VIP when a person retires.

BY MR. TERLEP:

Q So when we were talking earlier about the forfeiture of 80 percent, 60 percent, and 40 percent, those amounts would not be forfeited if a person retired early, but the person would receive those payments in the normal course of the distribution of VIP accounts?

A That is correct.

Q And they would not be included in a severance payment determination?

A That is correct.

Q Now take a look at the second page of that Exhibit [95] Number 13.

There are a number of factors, whatever they are, listed under Roman numerals V through VIII that are not on Exhibit Number 12.

Do you know why those factors are on Exhibit Number 13 and they are not on Exhibit Number 12?

A They are additional considerations that are appropriate only to a member of the executive payroll, or what we commonly refer to as 90 series payroll.

Q Were these considerations unique to individuals receiving severance payments or were they considerations that were applicable to all individuals taking retirement from The Boeing Company?

MR. BENNETT: In the 90 series?

MR. TERLEP: In the 90 series, fair enough.

THE WITNESS: I am afraid I don't understand your question.

BY MR. BENNETT:

Q Well, when an individual in the 90 series retires, do you provide income tax service for them?

A For the year in which they retire if they are eligible, if they happen to be among those who are eligible.

[96] Q Well, the fact they are listed under Roman numeral number VIII, is that a factor which is considered solely for the year in which he retires?

A Well, let me see if I can answer the question I think you are trying to ask.

MR. BENNETT: No. You answer the question he asked.

Excuse me. But don't answer questions you think he is asking.

THE WITNESS: I don't understand your question.

BY MR. TERLEP:

Q In factor number VIII a factor which is based upon providing money for income tax services which is the same as that which is provided for all individuals who retire from The Boeing Company, or is it—

A No.

Q How is it different?

A These figures are based on something that was assumed Paisley would lose by retiring early, that he would otherwise have been entitled to had he remained employed.

Q Okay. The company pays for income tax service, or tax service for its 90 series employees?

A For certain of them, yes.

[97] Q Would it for Mr. Paisley?

A Yes.

Q Now, this three years listed under this factor number VIII, does that apply to the three years that Mr. Paisley was expected to be a government employee?

A Yes.

Q Now, with regard to number VII, factor number VII listed on the second page of that, is that factor normally considered when an individual retires from The Boeing Company. In other words, an individual other than an individual resigning or retiring to accept government employment?

A No.

Q How is it different?

A We don't—it is just not considered in the case of a normal retiree.

Q You don't provide life insurance for normal retirees?

A Oh, yes, there is life insurance provided for executive payroll retirees.

Q Is it in the amount listed in this factor number VII?

A No, it is in varying amounts. It is three times an individual's base pay at the time of his retirement on a [98] descending scale: 75 percent of that value for the first year of his retirement, 60 percent in the year following that, and on a descending scale for each ensuing year.

Q What is the life insurance that you provide for normal employees as they are employed by The Boeing Company?

A I believe it is two and a-half times their salary.

Q Now, what does this "Supplement to 'keep whole'" column mean? Next to Roman numeral Number VIII. Under Roman numeral number Eight.

A It is the amount of life insurance required when added to the amount of life insurance provided by the company, would equal the amount of life insurance in force at the time of his retirement.

Q As if he were continuing to be a Boeing employee, notwithstanding his retirement?

A Yes.

Q There are three years listed there under number VIII. Was this in anticipation of his remaining with the government for three years?

A Yes.

Q Okay. Now, the medical coverage listed under Number VI, is that medical coverage the same as that which is [99] provided for any normal retiree?

A That is correct.

Q So there is no dollar amount listed next to that factor?

A Right.

Q With regard to stock options, is the factor listed under stock options applicable to those persons who are normal retirees? In other words, those people who—to all people who retire from The Boeing Company?

A At that time, yes.

Q How is it different today?

A Well, the exercise period I believe has been extended to two years, rather than six months as stated in that.

Q Now, Exhibit Number 13, is this a document that was considered by The Boeing Company in connection with its determination of the amount of severance payment to be made to Mr. Paisley?

A I am not sure whether or not it was. It was one of many, or several workups for calculations, but whether or not it was the final one I don't recall.

Q I didn't ask you if it was the final one. I asked you whether it was considered?

[100] MR. BENNETT: He said he didn't know. It was one of several workups.

BY MR. TERLEP:

Q But this was prepared by someone in The Boeing Company?

A Yes.

Q Do you know who it was prepared by, or what office prepared it?

A I am not sure.

Q Did you request that to be prepared?

A I don't recall.

Q Okay, I will ask you to take a look at Exhibit Number 14.

Let me just finish up with 13. These factors on the second page of Number 13, were they factors that were considered in connection with the determination of severance pay to be made to any of the employees involved in this case other than Mr. Paisley? Same factors?

In other words, if—

A No, it did not apply to anyone but Mr. Paisley.

Q Why would the factors referred to on the second page have been unique to Mr. Paisley?

[101] A Because he was the only one of those individuals who was classified in the executive payroll at that time.

Q As a 90 series employee?

A Yes.

Q Okay, I ask you to take a look at Exhibit Number 14. (Handing document to witness) And ask you if you have seen that document before today?

A Yes.

Q When did you first see it?

A I don't recall, but I prepared it.

Q You prepared it?

A Yes.

Q Is it a complete document? Is it complete in one page?

A No, it is one of several pages.

Q How many other pages are there?

A Gee, I don't have a recollection of that.

Q The title to this document is "Other items contained in M. Paisley's submittal." What is "M. Paisley's submittal"?

A Mr. Paisley submitted to the company an evaluation that he worked up on the impact, primarily financial as he viewed it, if he were to accept government employment, which [102] was very detailed and quite lengthy.

Q Did The Boeing Company ask him to submit that?

A No.

Q Did he submit it voluntarily?

A Yes.

Q Was it considered it connection with The Boeing Company's determination of the severance payment to be made to him?

A Yes.

Q Now, the numbers on the left-hand side of this Exhibit Number 14, they are nonconsecutive. Why is that?

A They correspond to the numbers contained in the submittal, and if I recall correctly, I grouped them—this grouping that I am looking at was grouped under "Other items." There was another grouping, I believe, that was associated with benefits, another grouping.

Q Now, perhaps I can help you out on that.

Let me show you two exhibits at once here, 14 and 15, and ask you if you have seen those at any time before today? (Handing documents to witness)

MR. FENDRICH: Have we got been talking about 14?

MR. TERLEP: Oh, would you hand those back? The ones [103] I gave you are my copies. Let me give you the official copies.

MR. BENNETT: These are different.

MR. TERLEP: Yes, they are different than 14; this is 15 and 16. (Handing documents to witness)

BY MR. TERLEP:

Q I ask you if you have seen either or both of those documents before today?

A Yes.

Q When did you first see them?

A I prepared them.

Q Are either of them a part of Exhibit Number 14, the missing pages to 14? You said there were additional pages of 14.

A Yes, I believe it is all one package, if I recall correctly.

Q Together documents 14, 15, and 16 make up one package?

A Yes.

Q Okay, are there any other documents that were contained in that package?

A Not that I remember.

Q Which comes first in order?

[104] A (Perusing documents)

MR. BENNETT: If you know.

THE WITNESS: I believe 16 and 14 were prepared at the same time, and, frankly, I don't recall whether 15 was prepared at the same time or at some later date.

BY MR. TERLEP:

Q Well, would you take a look at number 16. I asked you about number 14, about the numbers in the columns on the left-hand side.

A Yes.

Q Are they referring to the same paragraphs of Mr. Paisley's submittal?

A Yes.

Q Are the nonconsecutive?

A Yes.

Q Is that correct? On number 16?

A Yes.

Q Why are there numbers omitted there?

MS. BERMAN: The questions assumes numbers are omitted.

MR. FENDRICH: Which number are you—

MR. TERLEP: I mean to ask about number 14.

[105] There don't appear to be numbers omitted on 16. I am sorry.

BY MR. TERLEP:

Q Take a look at number 14, sir. There are numbers omitted consecutively there; the first number is 6, the next number is 23.

MR. SHARP: They are sequential, not consecutive.

MR. TERLEP: They are sequential, but not consecutive.

MR. SHARP: They are consecutive but not sequential.

BY MR. TERLEP:

Q Whatever. The numbers 1, 2, 3, 4, 5, do not appear on that document, do they?

A No, they do not.

Q On that column? Why aren't they there?

A Again, they had to do with the way in which I grouped the items that Paisley had documented which he felt were losses that he would incur.

Q Can we take it that if they are not included on Exhibit Number 14, if the particular item in Mr. Paisley's submittal are not listed on Exhibit Number 14, particularly with regard to Exhibit Number 14, whether you had an objection [106] to those as items on Mr. Paisley's submittal?

I know that wasn't very clear.

A It represents a grouping of items which I did not think should be considered by the company in determining his severance pay.

Q Those paragraphs, to the extent that they are numbered on Mr. Paisley's submittal, they are not listed here, can we take it by implication that you did not object to those paragraphs?

MR. BENNETT: Well—

THE WITNESS: No, you cannot take it that I did not object.

BY MR. TERLEP:

Q Okay, then why weren't they lsited on this document?

A Because I did use them for comparisons to what I felt should be considered versus what he felt should be considered.

Q But we can't assume that item number 1 on Mr. Paisley's submittal was without objection from The Boeing Company simply because it is not stated on Number 14?

A That is correct.

Q Okay. Now with regard to Number 15, Exhibit 15, [107] this was prepared at sometime after Exhibits 14 and 16? Is that correct?

A I am uncertain as to whether I prepared it coincident with or shortly after Exhibits 14 and 16.

Q Why did you prepare Exhibits 14, 15 and 16?

A To provide an evaluation of Mr. Paisley's submittal to the company which represented a request on his behalf for consideration of a very large amount of money for severance pay.

Q Did you supply these documents to anyone?

A Yes.

Q To whom?

A To my boss, Bob Benson.

Q Were they supplied to Mr. Little? Did you supply them to Mr. Little?

A No, I didn't personally, I don't believe.

Q Do you know whether they were supplied to Mr. Little?

A I don't know for certain.

Q How about to Mr. Wilson?

A I don't know that either.

Q Mr. Skeen?

A I don't know.

[108] Q I will ask you to take a look at Exhibit Number 17. (Handing document to witness)

(Discussion off the record.)

BY MR. TERLEP:

Q Have you seen that document before today?

A Yes.

Q When did you first see it?

A I don't recall.

Q What is it?

A It is a request memo from HEbeler to Skeen for consideration of payment of severance pay to Herb Reynolds.

Q Was this document produced by Boeing in considering the amount of severance payment to be made to Mr. Reynolds?

MR. BENNETT: Vince, I have been real quiet the last half hour.

MR. TERLEP: I know.

MR. BENNETT: Your questions have been very pointed. But I object to this question again, the use of the term "consideration." I don't have a problem with the term "in connection with," because he prepared certain things or things were prepared in connection with it; but whether they were actually significant in the ultimate decision is something [109] that he doesn't know, so I object to the term "in consideration."

MR. TERLEP: Well, he is testifying on behalf of the corporation, again.

MR. BENNETT: Yes, but you withdrew "in consideration" before and agreed "in connection" was a better term.

He doesn't know what Wilson did, or he can only assume that—he does paper work and the paper work gets up, but he doesn't know if Mr. Wilson looked at a piece of paper and said: this is right, wrong, or I will consider this or not consider it. And that is the problem that I have with—you deposed Mr. Wilson and, I Mean, that is the basis of my objection.

BY MR. TERLEP:

Q Well, was this document prepared in connection with the consideration of the severance payment to be made to Mr. Reynolds?

A Yes.

Q I would ask you the same with regard to Exhibit Number 7?

A Yes.

Q But with regard to Mr. Jones?

[110] A T. K. Jones, yes.

Q Do you know whether a document similar to these two documents, Number 7 and Number 17, was prepared in connection with the determination for Mr. Paisley?

A I don't believe so.

Q Why not? If you know.

A He kind of short-circuited the system, I guess, and dealt directly, to some extent, with Mr. Skeen and Mr. Little.

Q Okay. With regard to Exhibit Number 18, I ask you if you have seen that before today? (Handing document to witness)

A (Perusing document)

MR. TERLEP: It is 42 I think.

(Witness conferred with counsel)

THE WITNESS: I am sorry, your question again?

BY MR. TERLEP:

Q Can you identify, have you seen Exhibit Number 18 before today?

MR. BENNETT: I believe you asked him about this in connection with Exhibit 42.

MR. TERLEP: Well, I believe that this is the same document. I am recalling now why the Paisley one was [111] different; it was because I was trying to get the writing clearly on the bottom.

MR. BENNETT: Well, go ahead and ask.

BY MR. TERLEP:

Q Is this the same, is Exhibit Number 18 the same as—is it the third page of Exhibit Number 42?

A Yes, it certainly appears to be.

MR. BENNETT: You are not including that little—

MR. TERLEP: I am not including—I can represent to you those red marks were placed on there by the auditors.

BY MR. TERLEP:

Q Is this the calculation which was prepared in connection with Mr. Reynolds' severance payment?

A I believe so, yes.

Q And it was the document which you considered as part of the company's determination—I am sorry, what—I want to get into the pattern of question that—

A "Prepared in connection with"?

Q Prepared in connection with the company's consideration of the severance payment.

MR. BENNETT: Thank you.

MR. TERLEP: In the determination of Mr. Reynolds' [112] —I happen to think that's enough.

BY MR. TERLEP:

Q I will hand you Exhibit Number 19 and ask you if you can identify, or if you have seen that document before today? (Handing document to witness)

A (Perusing document) Yes, I have.

Q Can you identify it?
A It was a workup or calculations prepared in connection with Mr. Reynolds' termination.
Q Who prepared this document?
A I don't know.
Q There appears to be some handwriting on the document. Do you know whose handwriting that is?
A No, I don't.
Q Do you know whether it was prepared before or after Exhibit Number 18?
MR. SHARP: If you know.
THE WITNESS: I don't know.

BY MR. TERLEP:

Q You have seen this document, though; is that correct?
A Yes.
[113] Q Do you recall when you saw it?
A No, I don't.
Q Do you recall whether it was before or after the severance payment was made to Mr. Reynolds?
A I don't recall.
Q Okay. Do you know why a factor is included on this document having to do with military retirement? Military retirement forfeiture?
A No, I don't.
Q Do you know why a factor was included on this document having to do with insurance benefits? Particularly I am referring to Number 19, Roman numeral IV.
A No, I don't.
Q Was Mr. Reynolds in the same class of employee at Boeing as Mr. Paisley?
A No.
Q With regard to Roman numeral VI on this Exhibit Number 19, do you know why this factor was included on this document?
A No, I don't.

Q I will hand you Exhibit Number 20 and ask you if you have seen that document before today? (Handing document [114] to witness)
A (Perusing document) Yes, I have seen this before.
Q When did you first see it?
A Yesterday.
Q You didn't see this in connection with your duties in considering or recommending, or otherwise, severance payment with regard to Mr. Reynolds.
A That is correct.
Q Do you know whether a document was submitted by Mr. Reynolds to anyone at The Boeing Company in connection with the determination of his severance pay?
A No, I don't know.
MR. TERLEP: Off the record one second.

(Discussion off the record.)

MR. TERLEP: I would like to treat this as an original.
We will have this marked and returned to me and we will make copies for attachment to this deposition.
MR. BENNETT: It is a copy.
MR. TERLEP: It is a copy that Mr. Sharp made for me.
This will be 21-A.
[115] (Memo from Hebeler to Skeen, 5/26/82, re Kitson's termination, was remarked Plaintiff's Exhibit No. 21-A for identification.)

(Document handed to witness)

BY MR TERLEP:
Q The reporter has handed you a document marked 21-A. I will ask you if you have ever seen that document before today?
A (Perusing document) Yes.
Q When did you first see it?
A I believe I first saw it yesterday.

Q Do you recognize any handwriting on this document?

A Yes.

Q Starting with the first page, would you identify the handwriting that you recognize?

A I recognize the handwriting in the upper right-hand corner to be that of Stan Little.

Q Can you read what he has written?

A Yes.

Q What does it say?

[116] A "Bob Benson, would you review and comment? Stan."

Q Okay.

A I recognize the initials next to S. M. Little in the cc area below.

Q Whose handwriting is that?

A That is Stan Little's handwriting, his initials.

Q Okay.

A I recognize the word "deleted" with the initials "RSB," dated 6/22/82, as being the handwriting of Bob Benson.

Q Now, there is a loop, for lack of a better way to describe it.

MR. SHARP: Are you asking him if he recognizes the handwriting of the loop?

MR. TERLEP: I am just asking if he recognizes that mark.

MR. SHARP: You may have a future in handwriting.

THE WITNESS: No, I don't.

BY MR. TERLEP:

Q Turn to the second page. Do you recognize the handwriting on the lower left-hand corner?

A Lower left-hand corner?

Q I'm sorry, the lower right-hand corner. It is [117] getting late.

A No, I don't.

Q Do you recognize the signature above H. K. Hebeler?

A Yes.

MR. SHARP: Can you read it, or does he recognize the handwriting?

MR. TERLEP: Does he recognize the signature.

THE WITNESS: I recognize it as being the signature of Mark Miller.

MR. BENNETT: Now, wait a minute—it is the signature of Mark Miller, signing it on behalf of Hebeler; right?

THE WITNESS: Yes.

BY MR. TERLEP:

Q The lower left-hand corner, there are a number of signatures above lines. Can you recognize any of those signatures?

MR. BENNETT: He has a pretty good hint here, because they typed out the names.

BY MR. TERLEP:

Q Well, what I am asking him—I will ask one by one if you like—whether or not the signature above the name of C. E. Skeen, whether you recognize that as the signature

[118] A Yes, I recognize each of them as being the signature of the individual.

Q Thank you.

Of the individual listed underneath the signature, is that correct?

A Correct.

Q Perhaps you will actually make your plane yet.

I hand you Exhibit Number 22 and ask you if you have seen this document before today? (Handing document to witness)

A (Perusing document) Yes, I believe I saw it yesterday.

Q Did you see it before that time?

A I don't have a recollection of seeint it before then.

Q Do you recall seeing a document used in connection—any documents used ir connection with the company's consideration of severance payment to Mr. Kiston?

A I have a recollection of reviewing some data as it related to supplemental pay for Mr. Kiston, but I can't specify precisely what it was.

Q What is supplemental pay?

A Did I say "supplemental pay"?

[119] Q Yes.

A I didn't mean to say "supplemental pay." I meant to say either terminal pay or severance pay.

Q Okay.

A Strike "supplemental pay."

Q Do you recognize the handwriting on Exhibit Number 22?

A No, I don't.

Q Okay. With regard to Exhibit 23, I ask you if you have seen that document before today? (Handing document to w'tness)

A (Perusing document) Yes.

Q When was the first time you saw that document?

A On or about July 27, 1982.

Q Is this a copy of a document used by The Boeing Company in connection with the severance payment made to Mr. Kitson?

A It is an authorization letter providing Mr. Murphy, who heads our payroll organization, the authority to prepare a check in the amount of $50,000 to Mr. Kitson.

Q Do you know what document is being referred to in the reference portion of Exhibit Number 23?

[120] A Do I have first-hand knowledge of that document? Is that what you are asking?

Q Do you know what it is?

A Do I know what it is? No.

Q Do you know if that is Exhibit Number 21-A?

A I can only speculate that it is.

Q Did you see this before or after it was signed by Mr. Benson?

A I don't recall.

Q What makes you believe that you saw it on or about July 27, 1982?

A Because that is the date of the memo.

Q Is it your practice to review documents such as these?

Why would you see it?

A Because I was involved in nearly all of the severance pay issues.

Q Including the actual order to make the severance pay and to cut the check as this document states?

A Yes, in some cases.

Q But not in all cases?

A No.

Q Exhibit Number 24, I ask you if you have seen [121] that document before today?

A (Perusing document) Yes, I saw it yesterday.

Q Had you seen it before that time?

A No.

Q Do you recognize the handwriting on this document?

A No, I don't.

Q I refer you to the middle of the document. There appears to be a number, handwriting starts out with 8 dash, and it goes on with a number of other figures.

A Yes.

Q Do you recognize what that number is?

A It is a typical 21 digit charge number used by The Boeing Company to charge its accounts.

Q Do you know to what account or to what type of account this number applies? Just by reviewing it?

A No, I don't.

Q Okay. I hand you Exhibit Number 25 and ask you if you have seen this document before today? (Handing document to witness)

A (Perusing document) Yes, I believe so.

Q When did you first see it?

A I don't recall.

[122] Q Did you see it in connection with the company's consideration of making the severance payments to Mr. Crandon?

A Yes.

Q Did you prepare this document?

A I don't believe so.

Q Do you know what alternate two means on this document?

A Yes.

Q What does it mean?

A It has reference to the alternate formula contained in the letter signed by Stan Little that we earlier discussed as one of two alternate methods for severance pay evaluation.

Q Do you know how the amount of severance pay made to Mr. Crandon was determined?

MR. BENNETT: Well, see, I object when you say "was determined," because that gets to the ultimate decision maker.

I don't have any objection if—

MR. TERLEP: I asked him if he knew how they arrived at that number.

THE WITNESS: No.

BY MR. TERLEP:

[123] Q Do you know who arrived, who determined that amount?

MR. FENDRICH: That amount being—?

MR. TERLEP: The amount of the severance payment made to Mr. Crandon.

MR. BENNETT: Who made the decision as to the amount?

MR. TERLEP: That is correct.

THE WITNESS: No, I don't.

BY MR. TERLEP:

Q Do you know who made the decision as to the amount made to Mr. Kitson?

A No, I don't have first-hand knowledge of who made those decisions.

MR. BENNETT: Whether you have first-hand knowledge or not, he is entitled to know who made the decisions.

Did you make them? Did Mr. Wilson make them? Did Ben Sharp make them?

THE WITNESS: Well, I believe they were made by Mr. Wilson, but I was not present, nor do I have first-hand knowledge of that decision.

BY MR. TERLEP:

Q In both cases?

A In both cases.

[124] Q Do you know whether alternate two, as you have described it, was taken into account in the decision regarding severance payment made to Mr. Kitson?

MR. SHARP: Do you want him to refer to this document again? (Handing document to witness)

MR. TERLEP: If he would like to refer to that exhibit, Number—

MR. SHARP: 22.

MR. TERLEP: —22.

THE WITNESS: Do I know whether alternate 2 was taken into consideration?

BY MR. TERLEP:

Q Right.

A In the payment to Kitson?

Q That's correct.

A I believe it was, but I don't know for certain.

Q Do you know who made the final decision on the severance payment, of the amount of the severance payment made to Mr. Paisley?

A Mr. Wilson.

Q With regard to that made to Mr. Jones?

A Again, Mr. Wilson.

[125] Q With regard to that made to Mr. Reynolds?

A I am not certain, but I believe it was Mr. Wilson.

Q Okay, I will ask you to take a look at Exhibit Number 26. (Handing document to witness)

A (Perusing document)

Q I ask you if you have seen that document before today?

A Yes, sir.

Q When was the first time that you saw that?

A On or about February 22, 1982.

Q Is the same type of document as Exhibit Number 23?

A Yes.

Q Does your signature appear on Exhibit Number 26?

A Yes, it does.

Q What is the charge number listed on Exhibit Number 26?

A It is a number furnished to us by an Industrial Relations representative in Boeing Aerospace Company.

Q Do you know who that person was?

A No, I don't.

Q Do you know what this charge number means with [126] regard to a particular account?

A No, I don't.

Q Do you know how the severance payments made to the five individuals in this case were treated for accounting purposes within The Boeing Company, or within one of its operating companies?

A No, I have no knowledge of that.

Q Were the severance payments made to the five individuals involved in this case, defendants in this case,

charged to accounts, to overhead accounts used to determine payments on government contracts?

A I don't know.

Q I give you Exhibit 27 and ask you if you have seen that document before today? (Handing document to witness)

A (Perusing document) Yes, I reviewed this yesterday.

Q Did you see it any time before yesterday?

A No.

Q Do you know what it is?

A No.

Q Okay. We are getting toward the tail end.

MR. TERLEP: Would you mark this as Exhibit 44.

Again, Exhibit 44 is a document that I only have the [127] original of. I will provide copies to everyone.

(Memo from Koester to Heyel, 2/17/82, re termination pay, was marked Plaintiff's Exhibit No. 44 for identification.)

(Discussion off the record)

BY MR. TERLEP:

Q I hand you Exhibit Number 44 and ask you if you can identify that document? (Handing document to witness)

MR. BENNETT: What is the question?

BY MR. TERLEP:

Q Whether you can identify the document?

A Yes. It is a letter from Mr. Koester to DCAA, to an individual named JAmes N. Heyel, H-e-y-e-l.

Q Does Mr. Koester's signature appear on that document?

A Yes, it does.

Q On Boeing's letterhead?

A Yes, it is.

MR. TERLEP: Indulge me, please, one second.

I remove the staple from this document. I will ask that this entire thing be marked as the next numbered [128] exhibit. This likewise is an original document. This likewise is a document that I only have this copy of. I will provide copies later.

(Memo from Koester to DCAA, Attention Lanier, 11/23/82, re termination pay, was marked Plaintiff's Exhibit No. 45 for identification.)

(Discussion off the record.)

BY MR. TERLEP:

Q I hand the witness a copy of the document marked Exhibit 45 and ask him if he can identify that document and the attachments to that document (Handing document to witness)

A (Perusing document) Exhibit Number 45 is a letter from Charlie Koester to Defense Contract Audit Agency, to the attention of K. Lanier, L-a-n-i-e-r, dated November 23, 1982.

MR. TERLEP: Oh, excuse me for a moment. I found the original of that. I thought all I had was a copy.

I wonder if I could substitute this for Exhibit Number 45?

Can we have an agreement of counsel that I can [129] substitute, withdraw this 45 and substitute this 45?

(Indicating)

MR. BENNETT: Anything you want, pal.

MR. TERLEP: You can examine them for conformance if you like.

(Document handed to witness)

MR. SHARP: We have this one before, without the name on it, right?

MR. TERLEP: That is right.

MR. SHARP: It is much harder to identify the individuals without the names.

MR. TERLEP: You live up to your name, sir.

BY MR. TERLEP:

Q What is this Exhibit 45, sir?

A It is a transmittal letter in response to a request, apparent request by the DCAA, providing a listing of employees terminated from or retired from The Boeing Company to accept government employment.

Q Is it a listing of individuals to whom Boeing has made severance payments since 1982?

MR. BENNETT: The document does speak for itself.

THE WITNESS: Yes. Although it includes at least [130] one individual to whom we did not make a severance payment to.

BY MR. TERLEP:

Q Who is that?

A Jerry Calhoun.

Q Do you know why severance payment wasn't made to Mr. Calhoun?

A Yes.

Q Why?

A It was the opinion of the company that Calhoun suffered no loss, in fact suffered a significant gain, by accepting his government employment, and therefore severance payment was not in order.

Q Was that a requirement for the company making severance payments to individuals, that they suffered no loss as a result of taking government employment?

MR. BENNETT: I object to the question.

THE WITNESS: No.

MR. BENNETT: Wait a minute. I don't think you meant to ask the question that way.

MR. SHARP: You garbled the question.

MR. TERLEP: Did I? It's late. I'm sorry. For this one I have an excuse.

[131] MR. BENNETT: Why don't you ask it again?

BY MR. TERLEP:

Q Was a part of Boeing's practice—

MR. SHARP: The last question was the last one.

BY MR. TERLEP:

Q Let me put it to you this way, if an employee left Boeing for government employment and his salary with the government was greater than his base salary plus any bonuses that he was receiving at Boeing, would he be ineligible for consideration of his severance pay under Boeing practice?

A No.

Q Well, how did the relative of pay between what Mr. Calhoun received at Boeing and what he was going to receive from the government play a role in Boeing's decision not to make a severance payment?

A Well, your question, your previous question restricted the consideration to the base salary and/or any incentive that they might be eligible for. It did not include other benefit losses that the person might incur.

Q Such as?

A Such as FSP and VIP considerations.

Q Financial savings plan?

[132] A Financial security plan and—

Q Financial security plan?

A —voluntary investment plan, or other benefits that might accrue to him at The Boeing Company that may or may not—might not accrue to him in government service.

Q This is over the years, this is in comparison between what he would have received with The Boeing Company had he stayed and what he would get as a government employee?

A It might include that consideration, but more importantly, I think, it is a consideration of whether the person suffered a financial hardship, taking all things into consideration, not just his base and incentive pay, by accepting government employment.

Q But the hardship would be with reference to the difference between what he would receive if he had stayed in all benefits as a Boeing employee and that which he would then expect to receive as a government employee?

MR. SHARP: I think he has answered that question several times.

MR. TERLEP: I don't think he has.

THE WITNESS: Certainly that would be taken into consideration, yes.

[133] BY MR. TERLEP:

Q What other factors would be taken into consideration?

A Time in service with The Boeing Company, what kind of an investment they have in terms of time at the company and progress that they have made, and interrupting their career growth by accepting that kind of employment.

Q Was the position that an individual was to accept with the government a factor in whether or not Boeing would make a severance payment to any particular individual leaving it to enter government service?

A I guess I would have to say only insofar as the amount of pay that was associated with the position as it related to what their situation was at The Boeing Company.

Q I don't understand what you mean by that answer.

MR. BENNETT: He told you, he said presumably the higher the job—the higher you are at The Boeing Company, the higher the pay you have at The Boeing Company; the higher the pay at The Boeing Company,

the more benefits you are likely to have and the greater the hardship and loss if you leave the company.

BY MR. TERLEP:

[134] Q Is that correct? That would be your answer?

A Yes.

Q The higher the pay you would receive at the company, would you be more likely to receive severance payment than if you had a lower salary at the company?

MR. BENNETT: Now you've isolated it. He focused on hardship and loss, and that's what he's tied it to. You know that's what he has tied it to.

THE WITNESS: The answer is yes, because he would be more likely to suffer financial loss by accepting a government position.

BY MR. TERLEP:

Q You would not be likely to suffer financial loss if the person accepted a low-level government position?

A No, that is not what you said.

Q No, but I am asking you now, would you be likely to suffer financial loss if you left The Boeing Company to accept a low-level government position, such as one below GS-10?

MR. SHARP: Oh, it depends on what you are paid.

MR. BENNETT: He'd probably get a bigger severance payment.

[135] BY MR. TERLEP:

Q Let me ask you this, if one were an employee today, or in 1981, earning $25,000 at The Boeing Company per year and he took a position with the United States Government as a GS-12 earning $36,000 per year, would that individual have qualified for a severance payment from The Boeing Company under Boeing's severance payment practices that existed at that time?

MS. BERMAN: Asked and answered; objection.

THE WITNESS: Likely not.

MR. BENNETT: I join, because he has answered there are several other factors in this.

MR. SHARP: You said "weren't qualified." What does that mean?

MR. TERLEP: Whether he was eligible to receive a severance payment. His answer was "likely not."

BY MR. TERLEP:

Q Why was it likely not?

MR. SHARP: You didn't ask if he was eligible. You are restating the answer to a different question.

BY MR. TERLEP:

Q Well, I will ask you another question then: Would that person have been eligible, the person I just described, [136] would he have been eligible for the receipt of a severance payment under Boeing's severance payment practice existing during the years 1981 and 1982?

MR. SHARP: "Eligible" meaning would he have been considered?

MR. TERLEP: Yes.

THE WITNESS: Yes, he would have been considered.

BY MR. TERLEP:

Q Are you aware of any—

A But he would likely not have received one.

Q Why?

A Because in your illustration, he received an $11,000 salary increase, increasing his salary from $25,000 to $36,000 I believe was your illustration.

Q Right.

A And it is unlikely that there could have been a demonstration of financial hardship by his accepting that job.

Q Okay. Now let's just reverse those figures. Suppose the person had a Boeing salary of $36,000 a year

and he was accepting a position with the government for $25,000 a year—this is in the years 1981 and 1982—would that [137] person have been eligible for consideration of a severance payment under bonus severance payment practice as it existed during those two years?

A Yes.

Q Are you aware of anyone under those circumstances or similar circumstances who were considered for severance payment by The Boeing Company during those two years?

MR. SHARP: You mean does he know anyone in 1981 who was making $36,000 and went into government at $25,000? Is that your question? I think it was.

THE WITNESS: That's your question.

BY MR. TERLEP:

Q Well, let me put it this way, are you aware of any person, other than those people who are listed on that list that is attached to Exhibit Number 45, who were considered by The Boeing Company for the receipt of severance payment during the years 1981 and 1982?

A I can think of one individual whose name does not appear on here who was considered.

Q Who was that?

A Perry Sykes.

Q And what was his position at The Boeing Company?

[138] MR. SHARP: You mean his title?

MR. TERLEP: Yes.

THE WITNESS: I don't recall. He worked in the Boeing Aerospace Company in some sort of a planning capacity.

BY MR. TERLEP:

Q How did you become aware of the company's consideration of severance payment to him?

A I personally discussed it with him.

Q And was—

A Or he personally discussed it with me.

Q Was severance payment made to him?

A No.

Q Did he come to work for the Federal Government?

A No.

Q Why was the severance payment not made to him?

A Because he chose not to leave The Boeing Company for the government position.

Q That was a condition for severance payment to be made, right?

MR. BENNETT: That you had to be severed, we will stipulate to that.

THE WITNESS: Yes.

[139] BY MR. TERLEP:

Q Are you familiar with whether The Boeing Company has considered at any time since 1980 making a severance payment to Donald Mann, M-a-n-n?

A Yes, I believe so.

Q Would you tell me what you know about that consideration?

A Oh, boy.

MR. BENNETT: He asked what you know?

THE WITNESS: My recollection is that Mann came to work for the government prior to any request being made for severance pay. He was already in the government employ and the company decided that it would be inappropriate to provide him with severance pay because he was already in the employ of the government.

BY MR. TERLEP:

Q Did he ask for severance pay after he had entered the United States Government?

A Yes, he did.

Q Did the company consider making a severance payment to him before he asked for the severance pay?

A I don't recall.

[140] Q When was this—
A Oh, boy.
Q —that the company made this determination?
A I don't remember.
It was shortly after Mann was employed by the government, whenever that was.
Q Was it after the considerations that were made in connection with the individuals that are defendants in this case?
A I simply don't remember.
Q Who made the determination not to make severance payment to him?
A I can't recall specifically who made that determination. It was considered by several people, and it was on advice of legal counsel as well, that we not make payment.
Q How did you learn of this consideration relating to Mr. Mann?
A Through conversation with several other Boeing employees.
Q Who were they?
A Oh, Tim Planta was one of them.
Q Who was he?
[141] A Planta, Industrial Relations supervisor that was involved in the request.
Q Anyone else?
A Yes, I discussed it with Bob Benson, and I can't recall specifically who else.
Q Okay. I have got two more exhibits and that is all.
MR. TERLEP: This will be 46 and this will be 47.

(Letter from Martin to Caffiaux, 8/14/81, was marked Plaintiff's Exhibit No. 46 for identification.)

(Letter from Albrecht to Duffy, 9/3/81, was marked Plaintiff's Exhibit No. 47 for identification.)

(Documents handed to witness)

BY MR. TERLEP:

Q I will ask you if you can identify Exhibit Number 46.
MR. SHARP: Has he ever seen it before?
MR. TERLEP: I asked him if he can identify it.
THE WITNESS: It is a letter from John C. Martin [142] to Mr. Jean A.—the last name is spelled C-a-f-f-i-a-u-x, Vice President of the Electronics Industries Association, dated August 14, 1981.

BY MR. TERLEP:

Q Do you know who Mr. Martin is?
A Yes.
Q Who is he?
A He is an executive of The Boeing Company.
Q Do you recognize his signature?
A Yes, I do.
Q Is that his signature on Exhibit Number 46?
A Yes.
Q Is that on Boeing Aerospace Company stationery?
A Yes, it is.
MR. BENNETT: You know, the document speaks for itself, I mean.

BY MR. TERLEP:

Q Exhibit Number 47—
MR. FENDRICH: Do you have copies of 47?
MR. TERLEP: Yes, I do.

(Discussion off the record.)

BY MR. TERLEP:

[143] Q Do you have 47 before you?
A Yes.
Q Here is a copy of Exhibit 47 for you.
MR. BENNETT: Thanks.

BY MR. TERLEP:

Q I ask you if you can identify that document?
MR. BENNETT: The document speaks for itself.
Go ahead.

BY MR. TERLEP:

Q Is it a document of The Boeing Company?
Is it a letter from The Boeing Company?
A Yes, it is a letter from Mr. Richard Albrecht of The Boeing Company to Joseph J. Duffy, Assistant General Counsel of the Department of the Navy, dated December 3rd, 1981.
Q— Okay.
MR. TERLEP: This will be Number 48.

(Letter from Beighle to Duffy, 10/23/81, was marked Plaintiff Exhibit No. 48 for identification.)

(Document handed to witness)

[144] (Discussion off the record.)

BY MR. TERLEP:

Q Does the witness have 48?
MR. BENNETT: That is the Duffy letter?
MR. TERLEP: Right.
MR. BENNETT: What is your question about 48?

BY MR. TERLEP:

Q Is this a letter from The Boeing Company?
MR. BENNETT: It speaks for itself, but answer.
THE WITNESS: Yes.
MR. TERLEP: Okay, this is the last one, gentlemen, I promise.
Iwill ask that this be marked as Exhibit 49.

(Letter from Beighle to Duffy, 1/15/82, was marked Plaintiff's Exhibit No. 49 for identification.)

(Discussion off the record.)

BY MR. TERLEP:

Q This is Exhibit Number 49. (Handing document to witness) I ask you if you can identify that document and the attachments to that document?
[145] MR. BENNETT: The document speaks for itself.
THE WITNESS: All right, your question again? I am sorry.

BY MR. TERLEP:

Q Is this a letter from The Boeing Company?
A Yes, it is.
Q To whom, sir?
A To Mr. Joseph Duffy, Assistant General Counsel, Department of the Navy.
Q Okay.
MR. BENNETT: That is just the first page of the exhibit. The rest of the exhibit is a bunch of attachments.
MR. TERLEP: Right.
MR. LACOVARA: Does the witness know whether these attachments were included with the letter?
THE WITNESS: No. I don't know.
MR. LACOVARA: Have you ever seen the letter before?
THE WITNESS: Yes.

BY MR. TERLEP:

Q When did you see it first?
A I don't recall when I first saw it.
Q I direct your attention to the second page of that [146] document. It is entitled "Retirement Plan Committee Memorandum Number 369"—
A Yes.

Q —dated January 12, 1982.

Do you recognize the signatures at the bottom of that page?

A Yes, I do.

Q Are they the persons whose names are typed under the signature lines?

A They are.

Q Is this the document which was referred to in the body of the first page of Exhibit Number 49 as paragraph a?

MR. BENNETT: The documents speak for themselves.

THE WITNESS: Yes, it is.

BY MR. TERLEP:

Q Okay. Is the document listed under paragraph 5 on the first page of that exhibit, is that attached or included in the exhibit?

A Yes, it is the last attachment.

MR. TERLEP: I have nothing further.

MR. BENNETT: In the interest of time, do you mind if I will ask what I want and if Ben has a few—

[147] MR. TERLEP: I have no objection.

MR. BENNETT: I don't want to take a recess.

MR. TERLEP: I have no objection.

MR. BENNETT: He may not have any anyway.

EXAMINATION BY COUNSEL FOR DEFENDANT BOEING

BY MR. BENNETT:

Q Mr. Hagberg, you have testified about various workups of financial data, calculations, on direct examination by Mr. Terlep; is that correct?

A Yes.

Q I also understand your testimony to be that to the best of your knowledge, the decision maker on the severance payments and the amount of the severance payments was Mr. Wilson. Is that correct?

A That is correct.

Q Is it a fair statement to say that you would not have any personal knowledge as to which of the calculations or which of the workup documents Mr. Wilson would have reviewed in making that decision? Is that a fair statement?

A Yes, that is a fair statement.

Q Is is also a fair statement to say that you would not know of your own personal knowledge as to whether Mr. Wilson [148] considered any factors other than those that were worked up by your department and sent up to him?

MR. TERLEP: I object to the form of the question. I object to the lack of foundation for the question.

MR. BENNETT: Fine.

BY MR. BENNETT:

Q You can answer my question.

A It will have to be restated then.

Q All right. Mr. Wilson, in making his decision as to whether or not to give a severance payment to the five individuals, or the amount of the payments given to them, could very well have considered factors other than the various calculations on papers which you sent up to him; isn't that correct?

A Yes.

MR. TERLEP: Are you asking this witness to speculate? If you are, I object to the form of the question.

MR. BENNETT: No, I am not asking him to speculate.

BY MR. BENNETT:

Q You don't know what factors, all of the factors that he considered, correct?

A That is correct, I do not know.

[149] Q Were the severance payments that you have testified about today that were given to the individual

defendants, were they intended to in any way supplement their government salaries?

A No.

Q Were the severance payments made by Boeing to these five individual defendants in any way intended, so far as you know, to compensate them for their government service?

A No.

Q Were they contingent, these payments, in any way on the individual's returning to Boeing after their government service?

A No, absolutely not.

Q Now, several times throughout your deposition, Mr. Terlep has made reference to the fact that you made certain assumptions as to the length of their government service. Is that correct?

A Yes.

Q Had any one of the individual defendants left government service after six months, or nine months, or a year, would they have been required to return any portion of their severance payment?

[150] A No.

Q To your knowledge did you or anyone else make any commitments to the individual defendants that they would be rehired by the company?

A No.

Q Were these payments contingent in any way upon the length of service that these individual defendants gave to the government?

A No.

Q Had these individual defendants—

MR. TERLEP: I object. "Gave to the government," I don't understand what "gave to the government" means in context of that question.

MR. BENNETT: Gave services to the government.

MR. TERLEP: When, before they left Boeing?

MR. BENNETT: After they left Boeing.

BY MR. BENNETT:

Q You understood my question to mean after they left Boeing, didn't you?

A Yes.

Q Had any of these individual defendants worked for the government beyond a three- to four-year period—six, seven, [151] eight years, whatever—would there have been any adjustments made in the amount of severance payment?

A No.

MR. TERLEP: I object. I don't know by whom you are asking—

MR. BENNETT: By anyone at Boeing.

BY MR. BENNETT:

Q Or as Mr. Terlep would say, The Boeing Company?

A No.

Q Did Mr. Paisley, Secretary Paisley, or Mr. Jones, or any of the other individuals left government service and went to work for a Boeing competitor, would they be expected to return any portion of their severance payment?

A No.

MR. TERLEP: I am sorry, counsel, could you nail it down to a time? After they left government service or after they left Boeing's employment?

BY MR. BENNETT:

Q You understood my question to mean after they left government services, did you not?

A Yes.

Q You saw Mr. Paisley testify—are you aware he [152] testified today?

A I was told he did, yes.

Q Do you know Mr. Paisley is Assistant Secretary of the Navy?

A Yes.

Q If Mr. Paisley goes to work for Northrup or MacDonald Douglass, or Lockheed, or General Dynamics, tomorrow, would he be expected to return any portion of his severance pay to you?

A No.

Q To your knowledge, did you or did anyone else at Boeing indicate in any manner to any of the individual defendants that The Boeing Company expected any preferential treatment from them in return for their severance payments?

A No.

Q In fact, to your knowledge, have any of these individuals rendered any special treatment to Boeing as far as you know.

A No.

MR. TERLEP: By Boeing, I assume you mean The Boeing Company?

MR. BENNETT: Yes, The Boeing Company.

[153] BY MR. BENNETT:

Q Other than writing a letter of recommendation, perhaps, to the son of a Boeing employee who he has known since the age of six, do you know of any other special considerations given by any of the individual defendants to any employees at Boeing.

MR. TERLEP: I object to the form of this question. It's a doozy. It assumes all kinds of things that this witness—

MR. BENNETT: You very dramatically presented a letter of recommendation.

MR. TERLEP: Not in this deposition, Mr. Bennett.

BY MR. BENNETT:

Q Were you aware that Secretary Paisley wrote a letter of recommendation on behalf of the son of a Boeing employee?

A I was made aware of that just prior to this deposition.

MR. BENNETT: I don't have anything.

BY MR. SHARP:

Q Mr. Hagberg, I have just very few questions.

You testified today that among your functions is [154] some responsibility for setting corporate compensation policy for The Boeing Company, is that correct?

A That is correct.

Q Was in your view the severance pay practice of The Boeing Company as you have known it a part of an overall effort by Boeing to encourage public service?

A Yes, it was.

Q To your understanding, are the state and local government service, or teaching positions in academic institutions, public service that Boeing encourages?

A Yes, they are.

Q Now, you testified that persons assuming positions with local government or state government or teaching positions did not generally have to sever their employment relationship with The Boeing Company. Is that correct?

A That is correct.

Q Now I ask you to listen carefully, if a Boeing employee were required to sever his employment relationships with the company to assume a position with the state or local governments or an academic institution, would, in your view, Boeing make a severance payment to that individual if he suffered a financial loss?

[155] MR. TERLEP: I object as to the time, Mr. Sharp. Is this today or is this time relevant—

MR. SHARP: This is a hypothetical question in his capacity as a person in charge of corporate compensation policy.

MR. TERLEP: Does it apply as the policy exists today, or when it was relevant to this—

MR. SHARP: During the period 1981-82.

THE WITNESS: Okay. That is probably why I hesitate so long.

BY MR. SHARP:

Q Would you like me to restate it?

A It probably would have been considered for severance pay application in that instance, yes.

Q Just one last question. Do you know of any Boeing employees who have departed the company to enter the ministry?

A No, not personally.

MR. SHARP: I have no further questions.

MR. TERLEP: Who is next?

MR. FENDRICH: No, I don't think so.

MS. BERMAN: Mr. Hagberg, I have no questions.

MR. BENNETT: Does the stipulation apply to him that [156] we entered into earlier, on reviewing this transcript?

MR. TERLEP: Yes.

I assume you are referring to the stipulation that was at the start of Mr. Paisley's deposition?

MR. BENNETT: Right.

MR. TERLEP: We will incorporate those stipulations in this deposition as well.

Is that agreeable with you, Mr. Lacovara?

MR. LACOVARA: It is.

MR. TERLEP: Ms. Berman?

Excuse me, I am asking about stipulations that we entered into at the start of Mr. Paisley's deposition.

MS. BERMAN: Yes, I have no objection to applying those to Mr. Hagberg.

(Whereupon, at 6:05 p.m., the taking of the deposition was concluded.)

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GOV. EX. 125

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION UPON ORAL EXAMINATION OF
T.K. JONES

November 6, 1986

4:30 P.M.

7755 Marginal Way South

Seattle, WA

• • • •

[5] EXAMINATION

BY MR. TERLEP:

Q Mr. Jones, would you please state your full name and residence address?

A My name is Thomas Kensington Jones. My residence address is 6405 West Mercer Way, Mercer Island, Washington 98040.

Q By whom are you employed?

A I'm employed by the Boeing Company.

Q In what capacity?

[6] A I'm responsible for product development in the Ballistic Systems Division.

Q Do you have a title?

A I think it's Product Development Manager.

Q How long have you been in that position?
A Since January of this year.
Q Prior to that time, by whom were you employed?
A I was employed by the United States Government, Department of Defense.
Q In what position?
A I was the Deputy under Secretary of Defense, Research and Engineering, Strategic and Nuclear Forces.
Q Can you tell me what that job entails?
It doesn't necessarily have any relevance to our case, but I have often wondered what that title meant?
A Well I was the staff advisor to the Under-Secretary for Research and Engineering.
In that capacity I gave him technical advice on the programs, on the strategic programs of the United States.
Q What are strategic programs?
A Strategic programs are all programs which are involved in strategic warfare, namely nuclear [7] warfare. They do not include programs that pertain to tactical warfare.
Q Did the advice that you gave have to do with things like electronics for missiles or that sort of thing, was that your field?
A Yes, among other things.
Q Prior to your employment as stated with the government, what was, by whom, what was your previous position?
A I was employed by the Boeing Company.
Q When did you leave the Boeing Company?
A I left Boeing in May of 1981.
Q What was your position with Boeing prior to May of 1981?
A I was employed in the product development organization. I'm not sure if I can accurately recite the title, but it had to do with requirements for new programs for the company.
Q How long have you been employed by Boeing?
A I first came to Boeing in 1954. And was employed by Boeing until 1971.

I was then employed by the government for three years, returned to Boeing in 1974.
Q And then '74 through '81 you had continuous employment with Boeing?
[8] A Yes, sir.
Q Were you in the same job during that time?
A Yes.
Q How did you become aware of the position, that position that you accepted in 1981 with the government?
A I received a phone call from one of the people in the Pentagon, Dr. Wade.
Q What is his position sir?
A At that time he was the principle Deputy to the Under-Secretary for Research and Engineering.
Q That would be a position that would be above the position that you were employed in?
A Yes.
Q So he would have been your boss?
A The proper, correct statement would be to say that I had two bosses. Dr. DeLaur, the Under-Secretary, was my official boss, Wade was certainly the boss when Dr. DeLaur was not there.
Q Was he also a Deputy Under-Secretary of Defense, Dr. Wade?
A His title I believe was Principle Deputy.
Q Did he ask you to take a position with the United States Government?
A On the phone call I got he asked me to, if I [9] would please come to the Pentagon to discuss the matter with him.
Q When was that?
A To the best of my recollection, that would have been in May of 1981.
Q Did you take him up on his offer to come to discuss it?
A I did go to Washington and have that discussion with him.

Q Who else did you talk to if anybody, when you were in Washington about the job?

A I talked to, first Dr. Wade, and then to Dr. DeLaur. Then Dr. DeLaur asked that I talk to his executive officer, Colonel Hollender.

Q And as a result of those discussions, did you accept the position?

A No, I told him I would think about it.

Q Did you ultimately get back to them with a decision?

A There were two appointments. First, Dr. DeLaur he told me he wanted to hire me, but both he and Colonel Hollender made it quite clear that that was subject to a great many unspecified approvals.

A couple of weeks after, on the order [10] of a couple of weeks after, we had the conversations with DeLaur, I called him and told him tentatively I would accept a position if it was offered.

Q After you took your position as Deputy Under-Secretary of Defense, did you become aware of who needed to approve the decision to hire a person in your position?

A No.

Q So you don't know who the unspecified people were who needed to approve you hiring?

A The approval process was like a black hole and it remains so today.

Q When Dr. DeLaur offered you the position, did you consider it an offer of employment?

A No. Dr. DeLaur may it quite clear that there were approvals that were out of his hands.

Q So that when you got back to him about the position, is it a fair characterization to say that you agreed to have your name submitted for an appointment to that position?

A That would be a very accurate way to characterize the conversations.

Q Did you expect to be approved for that position at that time?

[11] A I had no way to know that.

Q Did you have any doubt that you would be approved?

A Some.

Q What were those doubts based upon?

A One is that it required a political approval. And at one time I thought I'd flunked that.

Q Why is that?

A I'm not a political person, I'm an engineer.

Q Was there a requirement for the job that you be a political person, that the person be a political person to fill that job?

A It came to my attention that there was a political approval somewhere in that black hole of an approval process.

Q In your mind, what is a political person?

A Well, the person asking me questions with regard to the political approval that I found was necessary, wanted to know what had I contributed to the Republican Party or to Mr. Reagan's election.

And that some past contribution was in their minds necessary to qualify me for the position.

I explained to them that I had had no [12] political party activities or other contributions in kind to that campaign.

Q What do you mean contributions in kind?

A I hadn't done any work or rang any doorbells or written any articles on behalf of Mr. Reagan's candidacy.

Q Did you have any other doubts that you would be hired?

A If so, I don't remember them now.

Q Was this a permanent position or temporary position that you were hired for?

In other words, was it a career position or was it a temporary position?

A It was described as a non-career position.

Q What do you understand that term to mean?

A A non-career in my understanding, was that I served at the pleasure of my bosses and they could, without any further process, fire me from that.

Q When you entered the job, did you have any expectancy to stay for a specific length of time?

A Dr. DeLaur had asked me if I would stay four years. And I agreed to stay that long.

Q Was that four years from the date you entered service or was it for the remainder of the then [13] current Presidential term.

A I interpreted it to mean four years from the day that I entered service. Although I cannot say that he was that explicit in what he meant by four years.

Q When did you first inform the Boeing Company about the, the possible act of you taking a position with the United States Government?

A I talked to my boss right after I received Dr. Wade's phone call.

Q Who was your boss?

A My immediate boss was Kendall Russell.

Q And that's the person you talked to?

A Yes.

Q What did you tell him?

A I told him about the phone call.

Q From Dr. DeLaur?

A The phone call was from Dr. Wade.

Q This was the phone call that informed you of the position and asked you to consider it?

A They asked me to come and talk about it.

Q What was Mr. Russell's action?

A Mr. Russell said that it was alright if I went and talked to Dr. Wade about the position.

Q Did he encourage you to favorably consider it [14] then, or at any subsequent time?

A No.

Q Did anybody at the Boeing Company encourage you to enter government service?

A No.

Q Were there any other conversations with Boeing personnel about this, the possibility of a job between Dr. Wade's phone call and the time that you informed Dr. DeLaur that you would like your name to be submitted for the appointment?

A Yes, but I don't remember the full list of people that I talked to.

Q Do you remember the subjects that you discussed?

A No.

Q Was one of the subjects whether or not you would receive a severance payment from Boeing?

A I believe that it would have been one of the subjects.

Q Who brought that up, you or someone from Boeing?

A That, I don't remember.

Q Did you make an application for severance payment?

A No.

Q How did you find out, when did you first become aware that Boeing made severance payments to it's [15] employees?

A In 1971.

Q How did you become aware of that at that time?

A I left the Boeing Company to work for the government and received severance payment.

Q Did you make application for that severance payment?

A No.

Q Did someone offer it to you at that time?

A Yes.

Q Without you having asked for it?

A Yes.

Q What was the amount of the severance payment?

A I believe it was five thousand dollars.

Q Do you know how the amount of this 1971 severance payment was calculated?

A No.

Q In 1971, did you submit anything to The Boeing Company which contained your views on how much severance payment you should receive?

A Yes.

Q What factors, if you can recall, were included on that presentation?

A I would have included to the best of my recollection, my costs of moving to Washington, [16] any differences in salary, fringe benefits.

My recollection of the matter is that I included all of the financial impacts that I knew about or was able to calculate.

Q Did your presentation to Boeing at that time include differences between the salary that you were making at Boeing at that time and the salary you expected to make with the government?

A Yes.

Q Was that multiplied by a particular number of years that you expected to be with the government?

A I don't rember that.

Q When you went, when you left Boeing to become a government employee in 1971, did you have an expectation that you would be a permanent government employee?

A No.

Q Did you have an expectation that you would be a government employee for a certain period of time?

A As I remember the discussions at that time, and please remember I'm trying to recall something that is now fifteen years ago, I believe the people that hired me explained that one could not contribute much to the government in ones first [17] year.

Because it took that long to learn how to work for an unfamiliar organization and that therefore they felt that for the government to get it's money's worth they wanted me to stay for at least two years.

Q Did you make a commitment to stay for a particular length of time, that you can recall?

A My recollection is that I agreed to at least a two year stipulation because I felt their position was reasonable.

Q Would your, the presentation that you made to Boeing at that time have included the difference in pay between your Boeing salary and your expected government salary for those two years?

A As I said before, I did include salary differences. I do not recall if there was, they were factored for a particular length of time.

Q Did you include any differences that would relate to the amount of money that would accrue to you as a result of Boeing's employee benefit plans?

A I don't remember that.

Q Are you a participant in the Voluntary Investment Plan at Boeing?

A Yes.

[18] Q Were you a participant in 1971?

A Yes.

Q You can't recall whether you included the losses that you might suffer with regard to that program in 1971?

A I don't remember that, no.

Q Do you know how the Financial Security Plan works at Boeing

A Yes.

Q Do you recall in 1971 whether you included that factor in your presentation to Boeing?

A I don't recall whether I included it, no.

Q Do you recall any other factors that you included or the presentation to Boeing?

MR. FENDRICH: In 1971?

MR. TERLEP: In 1971, yes, I'm sorry.

A After that many years, I can't say that I can remember that accurately.

MR. TERLEP:

Q Now we're looking ten years later in 1981.

Did you submit anything to the Boeing Company either orally or in writing about what you would expect to lose as a result of taking government employment?

A Again, I did include—

[19] MR. FENDRICH: Would you repeat the question?

THE REPORTER: Read back last question.

A Yes.

BY MR. TERLEP:

Q Who did you submit that to?

A I submitted that to someone in personnel.

Q Was it in writing?

A Yes.

Q Can you describe the document that you submitted to them?

A It was a set of rough calculations on engineering paper.

Q What were the calculations relating to?

A Again, the calculations that I furnished related to my thoughts as to the financial impact of severing from Boeing and joining the government, and they were not complete, they did not include all of the factors that in 1981 I was aware of.

They included only the factors that I had data for and could conveniently estimate.

Q Can you recall those factors?

A They would have included the same factors that I included in 1971. I know that the 1981 estimates included losses attendent to things like stock [20] options, and the Voluntary Investment Plan and the Financial Security Plan.

Q When you use the term losses, what did you mean by losses?

A There are at least two types of impacts or Financial Security Plan, excuse me, or Financial Security Plan.

There is one kind of loss which deals with the tax implications of, by having to pay capital gains and other taxes and rolling that, trying to roll those funds into some other investment program which is not tax sheltered.

That was not in the estimate that I provided to Boeing. On the Voluntary Investment Plan there are two types of losses, one of which had to do with the non-vested portion of that, which is accrued as a result of prior service. And the second kind again, dealt with the tax implications of rolling that amount into some other vehicle.

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[41] BY MR. TERLEP:

Q Did anyone in Boeing advise you to disqualify yourself from Boeing business after you started work for the government?

A No.

Q Did they advise you to do this at any time, either before or after you started work with the government?

A No.

Q Did you in fact disqualify yourself from Boeing business while you were employed by the United States?

A Yes.

Q When was that?

A On two occasions.

One occasion was in September of 1982 when the Office of General Counsel told me to do that. The second occasion was sometime in the fall of 1985 when, after I had made a decision to leave the employ of the government and Boeing was one of the several firms that I intended to discuss future employment with.

[42] Q When you joined the United States Government, were you asked to execute a financial disclosure report?

A Yes.

(Exhibit 30 marked for identification)

BY MR. TERLEP:

Q I would ask you if you can identify that document?
A I don't understand the term identify the document.
Q Have you seen this document before?
A Yes.
Q Does your signature appear on the first page of the document?
A Yes.
Q Where does it appear?
A It's the signature of the reporting individual.
Q Is this a copy of the document that you submitted to the government, known as a financial disclosure form?
MR. FENDRICH: It's certainly a document that is headed up financial disclosure form.
[43] A Yes.

BY MR. TERLEP:

Q When did you begin work for the United States Mr. Jones in the 1980's, do you recall the date?
A I believe it was around the first of June, 1981.
Q Did you go to work directly for the United States in a position as an employee or was there a time when you were a consultant with the United States prior to your permanent employment?
A I regarded myself as an employee.
Q From June 1, 1981?
A On or about that date.
Q This document bears that date, June 1, 1981. Is that in your handwriting?
MR. FENDRICH: It also of course bears other dates.
MR. TERLEP: Yes, it does.
A That is my handwriting, yes.

BY MR. TERLEP:

Q Is there any handwriting on this document that is not yours?
A The ethics officer is not my signature and the supervisor's signature is not my signature.

Q Continuing on to pages, all the other pages in this Exhibit, would you review those pages and [44] tell me if there are any, if there is any handwriting on this document that is not yours?
A I believe not.
Q Did you disclose the severance payment that you received from the Boeing Company to the United States?
A I included it in the disclosures on this form.
Q Would you point out where you included it?
MR. FENDRICH: Excuse me Mr. Terlep, I simply want to ask you, are you talking about specifically with respect to this form?
MR. TERLEP: Yes.
A It would have been included in the amount listed on the second line of Schedule A.

BY MR. TERLEP:

Q Would you read that line for me please?
A That is two hundred thousand three hundred dollars.
Q Is there a figure underneath that amount?
A There is a crossed out figure of one seventy-six, nine hundred.
Q What does that figure mean?
A My recollection is that that figure did not include the income from the company sponsored investment plans. It was after making that [45] mistake on the form, advised that that should be included on that line, so I changed the figure to reflect it.
Q Who advised you to do that?
A I asked David Reem I believe, is who I asked, in the Office of General Counsel as to how the various kinds of income that I had received from the Boeing Company during 1981 should be reflected on this form.
Q This is the Office of General Counsel of the Department of Defense?
A Yes.

Q Did you have any discussions with him about the severance payment that you received?

A Or the occasion of this phone call I told him I had received several kinds of income and asked for his advice on how it should be reported.

Q Did you specify the types of income you had received?

A Yes, I did.

Q Did you identify the severance payment you received as one of those items?

A Yes.

Q Did you identify it as such?

A Yes.

[46] Q Did you inform Mr. Reem or anyone else in the Department of Defense how you thought this severance payment was calculated?

MR. FENDRICH: As I'm sure you're aware, Mr. Jones' prior testimony on the point was that he, Mr. Jones did not know how it was calculated.

MR. TERLEP: You can answer the question.

A I didn't know how it was calculated and therefore I could not have informed anyone in the department as to how it was calculated.

BY MR. TERLEP:

Q So you informed them only that it was a severance payment?

A Yes.

Q And the amount of severance payment, one hundred thirty-two thousand?

A I don't recall that I told Mr. Reem the amount. In the discussion he indicated the amount was not relevant.

Q But you did inform him of the fact that you had received a severance payment?

A My recollection is that I listed for him the fact that I had received salary, severance pay, cash [47] out of stock options, income from the Voluntary Investment

Plan, and income from the Financial Security Plan. And wanted to know how each of those things should be included on this form.

Q And what did he tell you?

A He told me that the individual amounts were not important, the only thing of concern was the source and the total amount.

Q Did he tell you to list severance payment as a severance payment on this form?

A No.

Q Did he tell you to include it among the general category of income?

A He told me to lump all income as received from the Boeing Company into a single figure.

Q Did he tell you how to characterize that figure or describe the figure?

A I don't remember if he did that or not.

Q These words that say "Includes income from company sponsored investment plans", which is on the same line as the figure that you just described, those are your words?

A Those were my words and I added them at the time I made the correction of the figure that you see next to it.

[48] Q So originally, that line only had the ditto marks underneath the Boeing Company on it, is that correct?

A At the time the form was submitted, it had everything you see here.

Q At the time you first filled it out, it only had the ditto marks?

A Yes.

Q Then you changed the one hundred seventy-six, you struck the one hundred seventy-six thousand seven hundred figure and inserted the two hundred thousand three hundred dollar figure, and at the same time wrote these words that are on that same line, is that correct?

A That's correct.

Q Do you know whose signature appears as the ethics officer on this form?

A I believe that is the gentlemen affectionately known as Doc Cook.

Q Do you know where he works Mr. Jones?

A D.O. Cook, I believe is the chief administrative officer of the Pentagon, who has served many Secretarys of Defense for many years.

Q Did you have any discussions with him about your filling out this form?

[49] A No.

Q Did you have any discussions with him about your receipt of severance payment from Boeing?

A No.

Q Do you know who this, what signature this is next to the supervisor's signature on the bottom of page 1?

A That is Dr. DeLaur's signature.

Q Did you present this disclosure report to him?

A I sent it to him.

Q Do you recognize this as his signature?

A Yes.

Q Did you discuss with Dr. DeLaur at any time before you filled out this financial disclosure report the fact that you had received a severance payment from Boeing?

A Yes.

Q Did he ask you how it was calculated?

A No.

Q Did you inform anyone else at the Department of Defense that you had received a severance payment from Boeing?

A Yes, I informed Dr. DeLaur's executive officer, Colonel Hollender of that fact.

Q Anyone else?

[50] A I may have informed Dr. Wade. I do not remember for sure if I did or did not.

Q Is this Colonel Hollender?

A Yes.

Q Is he a military officer?

A Yes sir.

Q And Dr. Wade, when did you inform them that you received a severance payment?

A I don't remember the exact date.

Q Was it before or after you left Boeing?

A I had not received the severance payment until the day I left Boeing, so it would have to be after that, that I informed them that I had received it.

Q Did you inform any of them of the prospect of your receiving a severance payment before you left Boeing?

A Yes.

Q Who did you inform?

A I informed Dr. DeLaur and Colonel Hollender.

Q Did you inform either of those persons about your, about the contents of the submission that you made to Boeing on how much you thought you should receive or how much your financial losses would be?

[51] MR. FENDRICH: If in fact such a submission existed on the date you informed them?

MR. TERLEP: I'm asking about the factors, I guess.

MR. FENDRICH: And my comment was simply to clarify your question, because I think you used the past tense verb form.

And I think maybe you could establish approximate dates here as to his discussions with those people and when he made the submission and that would help to clear it up.

BY MR. TERLEP:

Q Did you talk to them after you made your submission to Boeing about your financial losses?

A Let's put it this way, I know that I talked to them before I made the submission and told them that it was likely that I may get severance pay from Boeing in process of separating from them.

Q Did you tell them what you thought you financial losses would be as a result leaving Boeing?

A I told them some of the factors that were involved in the financial impact.

Q What were the factors that you told them?

A I discussed salary differences, and reaffirmed with Dr. DeLaur that one must divest oneself of [52] all stock held in aerospace firms, so that then factored into whatever financial impact calculations that I had.

I don't recall what other factors I may have discussed with him.

Q What did you tell him about the salary difference?

A He wanted to know what I was making at Boeing, Dr. DeLaur did. And at that time, I didn't know what the government salary was, he told me.

Q Were you surprised at that time at the government salary?

A I was wounded.

Q So your discussions about salary difference I take it, arose after you found out what the government salary was?

A I don't want to mislead you into thinking we discussed a difference. He asked me what was my salary and I told him and he told me approximately what as the government salary and both of us being acquainted with arithmetic could then tell what the difference was.

Q But did you tell him that this was a factor that you presented to Boeing about what your financial loss would be as a result of leaving Boeing?

[53] MR. SHARP: I object to that. It seems to me the testimony was he had a discussion prior to his submission to Boeing.

MR. TERLEP: He had one discussion about that.

BY MR. TERLEP:

Q Is this the only discussion you had with Dr. DeLaur about salary difference?

A Yes.

Q So this is before you made your submission to Boeing?

A Yes.

(Exhibit 31 marked for identification)

BY MR. TERLEP:

Q I hand you what the Reporter has marked as Exhibit 31 and ask you if you can identify that document?

A Yes.

Q What is that?

A It is an affidavit which I prepared some years ago.

Q Does your signature appear on the last page of that document?

[54] A Yes.

Q Did the Boeing Company ask you to execute any document on the occasion of your termination in 1981 to the effect, either literally or to the effect that you were not to understand the severance payment that you were receiving from them as, to be compensation for future government service?

A Would you repeat that question?

THE REPORTER: Read back last question.

A To the extent that I have—

MR. FENDRICH: If you don't understand the question, and it's awfully long and cumbersome, maybe you just better not answer it. Maybe Mr. Terlep can break it down and make it simpler for you.

BY MR. TERLEP:

Q I asked him if he signed a document—

MR. FENDRICH: Why don't you ask him for example, whether he ever signed any document when he left Boeing and then you can work up from there.

BY MR. TERLEP:

Q Did you sign any documents when you left Boeing?

A I believe I signed one standard form.

[55] Q What did the standard form say?

A It was a standard form that the personnel people have that you sign when you leave the company.

Q What did it say?

A I don't recall all the things that it said, but it said my reason for leaving was to accept employment with the Department of Defense.

Q This was on a Boeing form?

A Yes.

Q Was there anything in there that related to your receipt of severance payment?

A No.

Q When you left Boeing, did you sell your Boeing stock?

A Yes.

Q Why did you do that?

A It was my understanding after a conversation with Dr. DeLaur that one must divest himself of all financial interest in the company, and Boeing stock is a financial interest in Boeing. So I sold it.

Q Who told you to do this.

A If you recall from the previous answer, I discussed this with Dr. DeLaur.

Q Was there anybody in the General Counsel's Office [56] of Boeing that advised you to do this?

A Not that I remember.

Q I direct your attention to, it is the 5th page of your affidavit, the pages you numbered.

Did you recevie any Boeing stock after you started work for the United States Government?

A Yes.

Q Would you state the cimcumstances of your receipt of that stock?

A It showed up in the mail one day.

Q I'm referring to paragraph C on the 5th page of your affidavit.

A Yes.

Q In the second sentence of that paragraph you state that you promptly notified the General Counsel and was advised to sell the stock.

What General Counsel are you referring to in that sentence?

A It was the General Counsel of the Department of Defense.

Q Was it the General Counsel or someone in the General Counsel's office?

A That was the General Counsel.

• • • •

[61] Q Were you given credit, any credits based upon your prior service with Boeing in the year immediately preceding your departure in 1981?

A I don't understand that question at all.

Q Perhaps it's a function of my not understanding how the vacation plan works.

But, do you get as much vacation now as you did when you left in 1981?

A In 1981 I had more than twenty years of service. For that reason, I was credited with vacation at the rate of four weeks vacation per year of service.

When I returned, I also had more than twenty years of prior credited service and therefore I received vacation credits at the same rate.

Q Did your vacation account start out at zero on the day you were re-employed with Boeing?

A Yes.

Q Were you subsequently given any vacation credits in addition to those that have built up since the day you started and today?

A No.

If you would like clarification, my eligibility date was June 14th. When June 14th [62] arrived, I was credited with the amount of vacation I had eared between when I started and June 14th.

Q But not anything relating to the time between January 1, 1981 and some date in May 1981 when you left?

A No.

Q When you left Boeing in 1981, did you forfeit any stock options?

A Yes.

Q When you were re-employed in 1986, were the stock options that you forfeited in 1981 restored to you?

A No.

Q Did you receive any, since you have joined Boeing in 1986, have you received any awards of stock options?

A Yes.

Q Do you know how they were calculated?

A No.

MR. TERLEP: I think those are all my questions.

THE WITNESS: Okay, thank you.

EXAMINATION

[63] BY MR. FENDRICH:

Q I believe you testified earlier that you received the severance payment from Boeing in 1981 sometime in mid-May, is that correct?

A Yes.

Q When you received the severance payment from Boeing, had you already been appointed as Deputy Under-Secretary of Defense?

A No.

Q Who was your employer on that date?

A Boeing.

Q Mr. Terlep asked you earlier about a submission that you made to Boeing with respect to the financial impact that the decision about entering government service might have upon your financial condition.

Do you happen to recall what the amount of the financial impact that you calculated and submitted to Boeing was?

A I don't recall the exact figure.

But I made it very clear to Boeing that whatever that figure was, it was not complete and did not include the total impact.

Q Did you ever arrive at an estimate in your own mind of what the total financial impact of [64] leaving Boeing to accept a position with the government would be?

A Yes.

Q Can you remember what that figure amounted to?

A There were two figures. The reason there were two figures is that I could not promise to return to Boeing's employ and they could not and did not promise to reemploy me.

Therefore, I had to calculate a figure of what would be the impact if I did not come back to Boeing, and separately calculate a figure of what would be the impact if I did come back to Boeing.

As I recall, the impact if I did return to Boeing would be something like two hundred or two hundred ninety thousand dollars. And I believe the impact if I did not come back to Boeing was somewhere in the vicinity of four hundred and fifty or four hundred thousand dollars.

Q And the amount that you received from Boeing in the way of severance payment in 1981 was one hundred thirty-two thousand dollars?

A Yes.

Q And do you know what the relationship between the [65] amount that you received from Boeing and the amount of those calculations you previously described, do you know what that relationship is?

If any?

MR. TERLEP: I don't understand what you're asking.

BY MR. FENDRICH:

Q Do you know if there was any relationship between the estimates that you just mentioned in the area of

two hundred and ninety thousand, was it, four hundred thousand dollars and the figure that you got, the amount that you received from Boeing?

MR. TERLEP: I object. During his direct testimony he testified he doesn't know what the basis of the figure that he got from Boeing, so he couldn't possibly know whether there was any relation between the factors that he listed in his statement and those determined by Boeing.

BY MR. FENDRICH:

Q Do you know of any relationship, Mr. Jones?

A The amount of severance pay that I received was not equal to any individual figure in my estimate, nor could I duplicate that figure by [66] combining any of those estimates.

Q You testified earlier about certain steps that you took prior to your receipt of the severance payment from Boeing in May of 1981, to assure yourself that it was perfectly proper for you to accept such a payment.

Mr. Terlep didn't ask you what Dr. DeLaur told you when you inquired about the propriety of a severance payment, nor did he ask you what Colonel Hollender had told you.

Could you please describe for us what they did tell you about the acceptance of a severance payment?

A Dr. DeLaur told me that severance payments were a normal condition in hiring appointees at that level and that he had received severance payment from his prior employer and that his belief was that all of my contemporaries being hired into his organization had similarly received severance payments.

And in response to my question he said he had no concern whatsoever about the propriety or the implications of receiving severance payment.

I also mentioned to Colonel Hollender [67] that there was a prospect of receiving severance pay when I left Boeing and he made two points. One is that everyone

coming to work at my level was suffering considerable financial impact.

His belief was that everyone would receive severance payment from their prior employers.

Q Did Boeing ever inform you, either orally or in writing that the award of a severance payment would be conditional upon your remaining in government for a particular period?

A No.

Q Did they ever say that the award of such a payment would be conditional upon your remaining in a specific position within the Department of Defense?

A No.

Q Did they ever indicate that the payment would be conditional upon your remaining at a particular salary level within the government?

A No.

Q Did they ever indicate that the award of a severance payment would be conditioned upon your commitment to return at work at Boeing at some future time?

[68] A No.

Q Did they ever inform you, either orally or in writing that the award of a severance payment would be conditioned upon your giving preferential treatment or special favors to Boeing while you were in government?

A No.

Q Did you ever afford preferential treatment or special favors to Boeing while you were in government?

A No.

MR. TERLEP: I object to that question, it's irrelevant. We have not alleged there was any special or preferential treatment by Mr. Jones while he was a government employee.

MR. FENDRICH: Are you putting on the record that there was no such treatment afforded Boeing by Mr. Jones?

MR. TERLEP: We have alleged none.

BY MR FENDRICH:

Q Did you view the severance payment Mr. Jones, as being a form of compensation for services that you would be providing to the United States Government?

A No, I regarded it as a liquidation of my [69] interests in the company and therefore as a means to insure that all financial ties were severed.

Q Did you have any contracting, procurment or source selection authority in your position?

A No.

Q Did your superiors in the Department of Defense know that you had worked for Boeing?

A Yes, they did.

Q Did your superiors know that you had received severance payment from Boeing?

A Yes, they did.

Q Were you ever subjected to discipline or other adverse action by the Department of Defense on account of the severance payment that you accepted from Boeing?

A No.

Q Were you ever subjected to discipline or other adverse action for any other reason by your employers in the government?

A No.

Q Did anyone in the government ever ask you to resign?

A No.

Q Did you leave the government service of your own accord?

[70] A Yes, I did.

Q Did you ever breach your duty of loyalty to the United States while you were a government employee?

A No.

Q Do you believe that your superiors were satisfied with your service?

MR. TERLEP: I object, lack of foundation for the question.

BY MR. FENDRICH:

Q Did you ever receive any commendation for your government work?

A Yes, I did.

Q Could you tell me what commendation you received?

A When I left, I received the DOD meddle for Distinguished Public Service together with a commendation signed by Mr. Weinberger.

Q Do you believe that your superiors in the Department of Defense were satisfied with your devotion to the United States and to the performance of your public duties in office?

A Yes, I believe they were.

MR. TERLEP: I object for the record on the grounds of relevance. His beliefs have no relevance to this case.

[71] MR. FENDRICH: The commendation speaks for itself. I'm through.

MR. SHARP: I have no questions.

MS. BERMAN: I have no questions either.

EXAMINATION

BY MR. TERLEP:

Q When you had your discussions with Dr. DeLaur about the severance payment that you received, did he tell you what factors were included in the calculation of that payment?

A No.

Q Did he tell you about any factors that he knew about that were included in the calculation of the severance payments made to your contemporaries?

A No.

Q Did Colonel Hollender tell you about the severance, any factors included in the calculation of severance payments received by those other people coming into the government at your level?

A No.

[72] Q Do you have knowledge of how any severance payment made to any other individual was calculated?

A No. I didn't even know how mine were calculated.

Q You made a statement during the questioning by Mr. Fendrich to the effect that you considered the severance payment to be a liquidation of your interests in the company.

In your submission to Boeing, you enumerated or you stated that you enumerated as one of the factors of financial loss a salary differential.

How would that have related to your statement about liquidating your interest in the company?

A When I put together my estimate of financial impact, I included all the factors that I could think of. And the amount of severance payment when I finally realized how much it was, was less than the amount that it would take to liquidate the performance for past services.

But it was quite clear I didn't know which factors were included and which were not included in the total. That was left up to my judgment and my own rationalization, as to how [73] the amounts squared with the collective series of figures on the losses.

Q I've not seen this submission that you made to the Boeing Company. We have asked for it in our discovery request in another part of this case. But if and when we finally get that document, will there be any indication on the document as to which factors are those that liquidate past or accrued interests from your, interests accrued from your past service and those which are based on things like salary differential?

A No.

MR. TERLEP: That's all I have.

MR. FENDRICH: That's it.

(Deposition concluded at 6:15 P.M. Signature reserved)

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GOV. EX. 127

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION OF HAROLD KITSON, JR.

Washington, D. C.
November 13, 1986

* * * *

[21] Q When you had the discussion with Mr. Paisley, did he offer you the position of Deputy Assistant Secretary of the Navy?

MR. LACOVARA: I object; that calls for a legal conclusion. You can ask him what Mr. Paisley said.

MR. TERLEP: I don't think it asks for a legal conclusion. But if he can answer the question about what Mr. Paisley said by relation to what he said to him about whether he was offering him the position, I'd like to have an answer.

THE WITNESS: Mr. Paisley said he would like me to consider that position. He did not offer the position.

BY MR. TERLEP:

Q At that time or at any time?

A At that time.

Q Did you respond to what Mr. Paisley said?

A I told him I would consider it.

Q And did you do so?

[22] A I did.

Q Did there come a time that you communicated to Mr. Paisley that you would like to have your name submitted for an appointment as Deputy Assistant Secretary of the Navy?

A We met and discussed the position again on two occasions, if I recall correctly.

MR. FENDRICH: I think the question is, did there come a time when you told Mel Paisley that you'd like to have your name submitted for the position.

Is that correct?

THE WITNESS: Yes.

BY MR. TERLEP:

Q When was that, sir?

MR. FENDRICH: I believe the question calls for a yes or no answer.

MR. TERLEP: He said yes. I asked him when it was.

THE WITNESS: Approximately April or May.

BY MR. TERLEP:

Q Of 1982?

[23] A Yes.

Q You've just testified two or three questions ago that you had two subsequent meetings with Mr. Paisley.

What occurred during the first of those meetings?

A I described the first meeting.

Q How many meetings did you have altogether with Mr. Paisley about this time?

A I believe three.

Q What occurred at the second meeting?

A We discussed the position further. He clarified some questions.

Q Is that all?

A Yes.

Q Were the questions your questions?

A Yes.

Q Did you pose them to him during the meeting or did you pose those questions to him prior to the meeting?

A During the meeting.

Q And what did those questions relate to?

[24] A To obtain a better understanding of the position.

Q Do you recall what the questions were?

A I don't recall the specific questions, but they related to the responsibility of the position.

Q Did they relate to your compensation?

A Yes.

Q In what way?

A I asked what the position paid.

Q Did he tell you?

A He told me approximately.

Q Approximately what you would be paid, sir?

A He told me approximately what I would be paid.

Q Were you surprised when you heard what you would approximately be paid?

A No.

Q What occurred at the third meeting between you and Mr. Paisley?

A There was further discussion of the [25] position, how it fit in the structure of the Navy, and he expressed his need to have the position filled.

Q During any of the three meetings that you had with Mr. Paisley, was there any discussion about payments that you might receive from the Boeing Company on the occasion of your termination of employment with them?

A Yes.

Q Would you describe those discussions please.

A Mr. Paisley and his wife and I went to dinner, and he described some of the factors that should be considered.

Q Considered by whom?

A By me.

Q Was this dinner meeting one of the three meetings that you described?

A Yes.

Q Which meeting was that?

A I don't recall whether it was the second or the third.

[26] Q Do you recall the date of this meeting?

A No.

Q Was it before you started work for the federal government?

A Yes.

Q And what were the factors that Mr. Paisley told you you should consider?

A Factors such as the loss of retirement pay, the loss of savings and security, the loss of sick leave, accrued sick leave time.

Q Were there any other factors that you recall?

A The fact that I would be earning less. He pointed out that Washington was a higher-priced place to live.

Q Higher-priced than what?

A Than Seattle.

Q Anything else?

A I don't recall any others.

Q Did Mrs. Paisley participate in this discussion?

A Yes, she did.

[27] Q Did she suggest factors that you should consider?

A They did jointly.

Q Can you recall which factors were suggested by which person?

A I do not.

Q Did you suggest factors of your own that you might consider during that discussion?

A I don't believe so.

Q Was one of the factors that you discussed or that Mr. Paisley suggested to you relating to the difference in pay between your salary at the Boeing Company and that which you would receive with the United States government?

MR. FENDRICH: That's already been answered—asked and answered.

BY MR. TERLEP:

Q You can answer the question, Mr. Kitson.

A I answered that a few minutes ago.

Q Would you answer it again now, sir.

MR. LACOVARA: Mr. Terlep, I have an objection as to form as well. It's a complex [28] question. You asked him two things, whether Secretary Paisley suggested certain factors and whether that factor was discussed.

If you want to go back over the same ground, you may go back over the same ground—with some limitation.

Let's ask one question at a time, please.

MR. TERLEP: Well, I don't think I had asked that question before.

MR. LACOVARA: Let's just take the question and reformulate it, and we can move on.

MR. FENDRICH: I think the record will reveal that Mr. Kitson already testified that one of the things discussed was the fact that he would be earning less.

MR. TERLEP: That's right. I was trying to figure out what he meant by that statement, and so I think I'm entitled to an answer to the question.

BY MR. TERLEP:

Q Can you answer the question, Mr. Kitson?

MR. LACOVARA: I've objected to the question.

• • • •

[37] Q What was said during your conversations with Mr. Jones about the topic of termination pay from Boeing?

MR. LACOVARA: Object as to form again. You said "conversations," plural, and the witness said he didn't know whether there was one conversation or more than one.

BY MR. TERLEP:

Q Whatever. Any time you communicated with Mr. Jones, Mr. Kitson, I'd like to know what was said during those communications, whether it was one time or more than one time.

A We discussed termination payment but did not get into any detail.

Q What did you discuss about termination payment?
A Whether T. K. Jones had received termination payment.
Q And what did he tell you?
A Yes.
[38] Q Did he tell you the amount?
A No.
Q Did he tell you how his termination payment was computed?
A No.
Q Did you discuss factors to be considered relating to any loss that you might suffer as a result of leaving Boeing and taking employment with the United States?
A I don't recall.
Q Was there anything else that you remember about discussions with Mr. Jones about termination payments?
A No.
Q Did he suggest to you that you should submit something to the Boeing Company about any loss that you might suffer as a result of leaving Boeing's employment to enter government service?
A Not that I recall.
Q Do I recall that you said that you had similar discussions with Mr. Reynolds?
A Yes.
[39] Q And was there one such discussion or more than one such discussion?
A Only one that I can recall.
Q And when did that occur?
A The April-to-the-end-of-May time period roughly.
Q And was this before or after you consented to have your name submitted for appointment as Deputy Assistant Secretary of the Navy?
A Before.
Q And what was said during that discussion with Mr. Reynolds?
A I asked if he received termination pay.

Q And what did he tell you?
A Yes, he did.
Q Did he tell you the amount that he had received?
A No, I don't believe so.
Q Did he tell you how it was calculated?
A No.
Q Did he tell you the factors that you might consider in determining financial losses that [40] you might suffer as a result of leaving the Boeing Company to enter government employment?
A Not that I recall.
Q Was there anything else discussed between you and Mr. Reynolds with regard to termination payments?
A No.
Q Am I correct in understanding that the only thing discussed about termination payments between either you or Mr. Jones was the fact that both of them had received a severance payment or termination payment?
A That's all I recall.
Q Did there come a time that you became aware that Boeing made severance payments to its employees?
A Would you repeat that, please.
Q Did there come a time that you became aware at any time that Boeing made severance payments to its employees?
A Yes.
Q When did you become aware of that?
[41] A I don't recall exactly, but it was a good many years before 1982.
Q How do you define "a good many years"? Can you give me an estimate?
A Oh, it could have been as long ago as ten years, five to ten years, before 1982.
Q And how did you find that out?
A Discussions with Boeing employees.
Q Who were they?
A I don't recall who it was I spoke to regarding Boeing employees who had served with the government.

Q What were the circumstances surrounding your learning about Boeing's severance payment practice?

A That's ten to fifteen years ago; I do not recall the circumstances.

Q Did you inquire about it or were you told about it by someone gratuitously?

A I don't recall.

Q Did you have any understanding of what Boeing's severance payment practice was at that time?

[42] A No.

Q What did you learn about Boeing's severance payment practice?

MR. LACOVARA: Objection; it assumes that the witness did learn something about the practice.

MR. TERLEP: He just testified he learned about it ten to fifteen years ago, or five to ten years ago, rather.

BY MR. TERLEP:

Q What did you learn about it, sir?

A I learned nothing about how it was determined; I only learned that Boeing had paid severance payments to some prior Boeing employees.

Q Did you know who those employees were?

Ben Plymale and Wah Lin.

Q How do you spell that last name?

A I don't know.

Q Did there come a time that you learned more about Boeing's severance payments practice?

A I never learned how Boeing calculated severance payment.

Q Did you learn that Boeing did in fact [43] have such a practice?

MR. LACOVARA: Objection. What practice?

BY MR. TERLEP:

Q A practice to pay severance payments.

MR. LACOVARA: That I think he has already testified to.

MR. TERLEP: Well, this is five to ten years ago.

BY MR. TERLEP:

Q Did you learn anything in 1980 or 1981 or 1982, in any of those three years, that added to your previous knowledge of Boeing's severance payment practice?

A Only the fact that they continued to make the payments in 1981 and 1980, when T. K. Jones and Mel Paisley and Herb Reynolds left Boeing.

Q Did you hear that through the grapevine, or did one of those three individuals tell you at that time?

A I believe I just testified that I talked to Paisley, Jones, and Reynolds and that they all acknowledged receiving severance payments.

[44] Q I guess I misunderstood you. I thought you were talking about the year 1980 or 1981.

MR. LACOVARA: Well, Mr. Terlep, we know that the Reagan Administration didn't take office till January '81, and we know that none of the defendants in this case was approached about government employment until 1981 at the earliest, so any reference to 1980 and severance payments to Mr. Jones or Mr. Paisley or Mr. Reynolds obviously is an inadvertent slip of the tongue.

MR. TERLEP: Well, I don't know when they were first approached about government employment. For all I know they could have been approached before the Reagan Administration started. I haven't made any allusion in this deposition to the Reagan Administration.

MS. WETZEL: Mr. Terlep, I believe, if I may—I believe that Mr. Kitson had testified that he became aware that the Boeing Company continued to make payments in 1980 and 1981, when Jones, Paisley and Reynolds left the Boeing Company. I believe the dates that three individuals left the Boeing [45] Company is a matter of record.

MR. TERLEP: That's true. I'm just trying to fix the date when he learned more about it.

BY MR. TERLEP:

Q Is the time that you learned more about it, Mr. Kitson, at the time that you had the discussions that you previously testified to with Mr. Paisley, Mr. Jones, and Mr. Reynolds?

A Yes.

Q During the time 1981 and 1982, did you become aware of to whom Boeing's severance payment practice was applicable?

A No.

Q Did you think it was applicable to you?

A In 1982 I believed it would be applicable to me.

Q Why did you believe it would be applicable to you?

A Because my position in the company was comparable to that of Jones and Reynolds.

Q Was it your understanding that Boeing's severance payment practice was to make severance [46] payments to individuals in positions similar to yours who left the Boeing Company to enter government service?

MR. LACOVARA: Only government service, Mr. Terlep?

MR. TERLEP: That's the question right now.

MR. LACOVARA: I didn't hear the "only;" that's the concern I had about whether it was ambiguous.

MR. TERLEP: Well, I didn't say "only."

MR. LACOVARA: That's why I didn't understand the question.

MR. TERLEP: I'll ask the reporter to read it back. I'd like the witness to answer the question as posed.

[Pending question read back]

MR. LACOVARA: I object as to form.

BY MR. TERLEP:

Q Can you answer the question?

A It was an assumption on my part.

Q What was an assumption?

[47] A That people in comparable positions to mine received severance payment when they left Boeing.

Q Did you ask anyone at the Boeing Company to make a severance payment to you?

A I spoke to the personnel people to ask that if I left Boeing would I receive severance payment.

Q And who was the person that you discussed that with in personnel?

A I believe his name was Paul Turner.

Q And what did you say to Mr. Turner about termination payments or severance payments?

A I asked that if I would be considered for severance payment if I left Boeing to accept the position that I had discussed with Mr. Paisley.

Q And what was his response?

A He would look into it.

Q Did he subsequently have any communications with you about the subject of severance payments?

A We had several discussions subsequent to [48] that, yes.

Q And what was discussed during those discussions?

A Either he or I suggested that I come up with an estimate of the financial impact to me of leaving Boeing's service.

Q Was this discussion with Mr. Turner about which you've just testified before or after your discussions first with Mr. Paisley, next with Mr. Jones, and next with Mr. Reynolds?

MR. LACOVARA: I'm going to have to object to that one, Mr. Terlep.

MR. TERLEP: Just trying to cut down the deposition pages, Mr. Lacovara.

MR. LACOVARA: I appreciate the goal, but I don't know which discussions with Mr. Paisley, for example. He said he had at least three discussions with Mr. Paisley.

MR. TERLEP: Let's start with Mr. Paisley.

BY MR. TERLEP:

Q Was the discussion with Mr. Turner about [49] which you have just testified before or after your dis-

cussion with Mr. Paisley during the dinner meeting with Mr. Paisley and his wife?

A It was after the first meeting with Mr. Paisley, and I do not recall whether it was after or before the second and third meetings with Mr. Paisley.

Q Was Mr. Paisley discussed in any discussion that you had with Mr. Turner?

A Repeat, please.

Q Was Mr. Paisley discussed during any conversation you had with Mr. Turner?

A Mr. Turner acknowledged that Mr. Paisley had received termination payment.

Q Did he tell you whether or not Mr. Paisley had submitted a statement to Boeing about his financial losses on the occasion of the termination of his employment to accept government employment?

A I don't recall.

Q Did Mr. Turner advise you to include any factors on the submission that he suggested that you make to the Boeing Company?

[50] A He did not.

Q Did you discuss any factors with him about what factors you might include on such submission?

A I did.

Q And what did you tell him?

A I mentioned the same factors that we have previously discussed.

Q The factors you had talked about with Mr. Paisley?

A I beg your pardon?

Q The factors you had talked about with Mr. and Mrs. Paisley at dinrer?

A At some point in the discussions with Turner, yes, I think all of those factors were brought up.

Q I may have asked this. Do you recall how many times you met with Mr. Turner?

A I do not.

Q Do you recall when they occurred?

A Subsequent to my first meeting with Mr. Paisley and prior to my leaving the Boeing Company.

[51] Q Were the discussions with Mr. Turner before or after you agreed to have your name submitted for an appointment as Deputy Assistant Secretary of the Navy?

A Both before and after.

Q When did the discussion occur relative to that date that you agreed to have your name submitted about the factors you might include in your submission to Boeing?

A Would you restate, please.

Q You've testified that you had a discussion with Mr. Turner in which you mentioned to him certain factors, the same factors you had discussed with Mr. Paisley and his wife over dinner, and I'm trying to find out whether that discussion with Mr. Turner occurred before or after the date that you agreed to have your name submitted for appointment as Deputy Assistant Secretary of the Navy.

A That was discussed both before and after I agreed to have my name submitted.

Q Now, during those discussions with Mr. Turner in which you mentioned factors that might be [52] considered or that might be included, was one of those factors the difference in your salary at the Boeing Company and the salary that you expected to earn with the United States government?

MR. LACOVARA: Object as to the form of that question. You said "factors . . . included," and I'm not sure: included in what?

The witness testified about factors that he felt would affect his financial position. I want to know what the reference to "factors . . . included" means.

MR. TERLEP: In the discussions with Mr. Turner—he testified that he had discussions with Mr. Turner and that he discussed various factors that he had discussed with Mr. Paisley. And I asked him whether a factor included in those discussions with Mr. Turner was one involving the difference in his salary between the salary he was making at Boeing and the salary he was expected to make with the United States government.

MR. LACOVARA: I have no objection to that type of question.

[53] THE WITNESS: The answer is yes.

BY MR. TERLEP:

Q Did the discussions with regard to the salary differential also include a discussion of the number of years you expected to be employed by the government?

A Expected to be employed, if ultimately appointed, of course.

Q Yes.

A That would be purely a projection. Even after appointed, I would not know how long I would be with the government.

Q Did you have any expectancy at that time how long you'd be with the government?

A I expected two to four years.

Q On what was that expectancy based?

A The duration of the Reagan Administration, which would have been the shorter side of it, if he was not re-elected.

Q Was the factor regarding salary differential that we've just been discussing a factor the difference between the salary that you would receive [54] at the Boeing Company if you stayed for the remainder of the Reagan Administration then current and the salary that you would receive as a government employee from that time until the end of the then current presidential administration?

MR. LACOVARA: Mr. Terlep, I regret having to interrupt again, but I didn't hear the question.

MR. TERLEP: Are you having transmission trouble on your telephone?

MR. LACOVARA: No, I guess I didn't hear a verb in there.

MR. TERLEP: Perhaps the reporter could read that question back. It was a long question.

[Pending question read back]

MR. LACOVARA: I think you see the reason for my concern, Mr. Terlep.

MR. TERLEP: I certainly do, Mr. Lacovara—there is no verb there.

BY MR. TERLEP:

Q Mr. Kitson, did the factor of salary differential that was included in your discussions [55] with Mr. Turner involve the difference between your salary at the Boeing Company for the remainder of the then current presidential term, the difference between that number and the salary that you expected to receive with the government from that date through the then current presidential term?

MR. LACOVARA: I'll let him answer the question, but it's subject to the understanding that it's what he expected to receive if ultimately appointed.

MR. TERLEP: Yes.

MR. LACOVARA: You may answer the question, Mr. Kitson.

MR. FENDRICH: If you understand it.

THE WITNESS: I confess I do not understand it.

BY MR. TERLEP:

Q Well, we've played around with this long enough. Let me try to get to it as directly as I can.

Was a factor that you discussed with Mr. Turner the difference between your Boeing salary at [56] that time and the salary that you expected to receive from the government if you were appointed?

A Yes.

Q Was that difference multiplied by the number of years in the then current presidential term?

A Yes.

Q Did you discuss anything having to do with the voluntary investment program in connection with termination pay?

A Yes.

Q And what did you discuss in that regard?

A The amount that I would not acquire as a result of leaving Boeing at that time.

Q What do you mean by "not acquire"?

A If I stayed with Boeing, I would continue to receive the benefit of that plan; if I left Boeing, I would not.

Q And did you discuss a factor—was this factor in dollars amounts?

A At one point in time, yes.

Q And how were those dollar amounts [57] figured?

A The voluntary investment plan is based on salary received at Boeing. Hence I calculated the amount that I would not received based on the salary I was receiving at that time, and assumed pay increases.

Q Was this Boeing's contribution to that plan that you considered to be a loss or was it your contribution to that plan that you considered to be a loss?

A Boeing's.

Q You didn't consider as a factor in your discussions with Mr. Turner your own contributions during the next three years or the remainder of the presidential term to the voluntary investment program if you had stayed with Boeing?

A I don't believe so.

Q Did you discuss a factor having to do with Boeing's financial security plan?

A Yes.

Q And what did you discuss in that regard?

A A projection of the amount that I would [58] not receive as a result of leaving Boeing.

Q And how was that figured, how did that work?

A I don't recall the details of that plan now.

Q But it did have to do with something that would otherwise accrue to you if you remained employed by the Boeing Company but you would lose as a result of

taking the government position over the remainder of the presidential term, is that right?

A Yes.

Q Was there a factor involving unreserved sick leave that you discussed with Mr. Turner?

A Yes.

Q And what was discussed in that regard?

A The amount of unreserved sick leave that would be acquired if I stayed with Boeing and would be lost if I left Boeing.

Q This is again an amount that you would earn if you stayed with Boeing and that you would not earn if you took the government position during the remainder of the presidential term, is that right?

[59] A Yes.

Q Did this factor have anything to do with sick leave that had accrued to you prior to that date?

A I believe the factor is determined by the amount of time you've been with the company, and then projected. I don't recall the details of it.

Q You mean that the amount of sick leave that you are allowed is determined by reference to the number of years you were employed by the Boeing Company?

A I believe that is correct.

Q Was there also a factor that was discussed between you and Mr. Turner regarding a differential between vacation that you would receive with the federal government and that which you would receive if you stayed with Boeing for the remainder of the presidential term?

A Yes.

Q Was that factor translated into a dollar amount?

A Yes.

[60] Q How was it translated into a dollar amount?

A I don't recall exactly how I calculated the dollars, but the longer you stay with Boeing—and I had been with them for 14 years—the more time you build up, and so I translated that time into dollars. But exactly how I don't recall at this time.

Q Was a factor that you discussed with Mr. Turner in connection with your termination pay any factor having to do with the stock ownership plan at Boeing?

A Yes.

Q And what was that factor?

A I would lose the ability to acquire stock as a result of the stock ownership plan if I left Boeing.

Q This again would be stock that you would acquire over the years remaining in the presidential term if you remained to be employed by Boeing, or remained employed by Boeing rather?

A Yes.

Q And you would not acquire the stock [61] ownership if you took a position with the federal government, is that correct?

A No, I would not.

Q Was there a factor involving Boeing's retirement plan discussed with Mr. Turner?

A Yes.

Q Can you explain that factor and what was discussed?

A Early retirement, such as I took, penalizes your retirement pay by a certain percentage for each year prior to age 60. Hence I would lose that portion of the retirement pay that would have accrued as a result of my employment by Boeing from age 57 to 60.

Q Do you recall how much that factor equated to in dollars?

A I do not.

Q Did there come a time when you reduced the factors that we have just discussed to writing?

A Yes.

Q Did you include on that writing any other factors that you can now recall other than the ones [62] that we have just discussed?

A Not that I recall.

Q Was there a factor either that you discussed with Mr. Turner or that you included on the document that

you prepared—was there any factor involving your relocation costs to the Washington, D.C., area from Seattle?

A Yes, I believe there was.

Q Did the government pay for your move from Seattle to Washington, D.C., or to the Washington, D.C., area?

A Partially.

Q Did Boeing pay any part of your relocation move?

A Absolutely none.

Q Is it your understanding that your severance pay covered any such costs?

A No.

Q Was there a factor that you submitted either in your discussions with Mr. Turner or in any writing that you may have submitted to the Boeing Company about your expected financial losses as a [63] a result of your terminating your Boeing employment and taking employment with the government that had to do with relocation costs from the Washington, D.C., area to the Seattle area once your employment with the government was finished?

A I don't remember.

Q Was there a factor, either in your discussions with Mr. Turner or on any document that you prepared showing the losses that you might suffer as a result of terminating your Boeing employment to enter government employment that had to do with the difference in the cost of living between the Seattle, Washington, area and the Washington, D.C., area?

A Yes, we discussed this already.

Q How did you determine what the difference in the cost of living was?

A Obtained figures from, what is it, the Bureau of Labor Statistics, some government agency.

Q Did you obtain those statistics?

A Yes.

Q Did you write away for them or did you call somebody?

[64] A I believe I called someone in a government agency.

Q Did Mr. Turner suggest that you do that?

A No.

Q Did Mr. Turner suggest any of the factors that we have been discussing in the last 20 minutes to you?

A No, I do not believe that he did.

Q Did anyone at Boeing suggest to you that you should consider any of the factors that we have been discussing for the last 20 minutes in connection with the termination of your employment from Boeing to take government employment?

A No, I don't believe so.

Q So is it a fair statement to say that any factors that you included on any written submission that you may have made to Boeing which would list the losses that you expected to incur as a result of leaving Boeing, either by resignation or retirement, to join the Department of Defense or to take a position with the United States government, were your idea?

[65] A They were either my idea or ones that had come up during the discussion mentioned previously between Mr. Paisley and Mrs. Paisley and myself.

Q Did anyone assist you in preparing this document, the document that you presented to Boeing on your financial losses?

A No.

Q Did you type it yourself?

A It was either handwritten or my wife typed it.

Q Did your wife assist you in preparing it other than typing it?

A No.

Q Did there come a time when you presented a document to the Boeing Company which was an analysis of your estimated financial loss as a result of leaving

Boeing's employment and taking a position with the United States government?

A Yes.

Q And when was that, sir?

A Approximately May of 1982.

Q And who did you give that document to?

[66] A Paul Turner, if I recollect correctly.

Q Did you have any discussions with Mr. Turner about that document?

A He took it and said he would discuss it with his superiors.

Q Did he tell you who he was going to discuss it with?

A Not that I recall.

Q Did you ever come to learn who he in fact did discuss it with?

A I believe that he discussed it with people in the personnel chain, but I don't remember the names now, who his superiors were.

Q Did he tell you that he had done so?

A At a subsequent meeting he did.

Q Do you recall when that was, the date?

A No.

Q Was it before or after you agreed to have your name submitted for consideration for the position of Deputy Assistant Secretary of the Navy?

A Before.

Q Do you recall the date that you agreed to [67] have your name submitted for consideration for the position of Deputy Assistant Secretary of the Navy?

A I don't recall the exact date, but it was approximately the month of June, 1982.

Q Did all of your discussions with Mr. Turner at which severance payments were discussed, did they all occur prior to that time?

A Most of them. There may have been one or two after, but most of them prior to that date.

Q Did you talk to anyone else at the Boeing Company other than Mr. Turner regarding the topic of severance payment or termination payment?

A Yes.

Q And who was that?

A Dan Pennick.

Q And who is he, sir?

A He was the business manager for Bud Hebler, the president of Boeing Aerospace.

Q What did you discuss with him, and when?

A I don't recall when—approximately May, 1982.

Q What did you discuss with him?

[68] A I had by that time received an indication of approximately what the severance payment would be; I was dissatisfied with it, and I spoke to Dan Pennick to see if he could do anything about it.

Q Had you submitted the document containing your estimate of your financial losses to Mr. Turner before you had the conversation with Mr. Pennick?

A Yes.

Q Did you refer to the document in your discussions with Mr. Pennick?

A I may not have referred to the document; I'm sure I referred to the amount on the document.

Q The ultimate amount on the document or the amounts associated with various factors?

A The ultimate amount.

Q Did you discuss any of the factors included on the document?

A I don't recall.

Q What do you recall about that conversation?

A Mr. Pennick listened to me, said he would look into it and get back to me.

[69] Q Did he ultimately get back to you?

A Yes.

Q And what did he say?

A That nothing would be done about changing the amount.

Q Did he tell you how the amount, $50,000—that was the amount of your severance pay—

MR. LACOVARA: Objection; that's your testimony, Mr. Terlep. Why don't you ask him.

MR. TERLEP: I will, thank you, sir.

BY MR. TERLEP:

Q What amount was communicated to you before your discussion with Mr. Pennick—what was the amount of the severance payment proposed to be made to you?

A $50,000.

Q And who told you that?

A I believe it was Paul Turner.

Q And did anyone tell you how that amount was computed?

A No.

Q At any time?

[70] A Never.

Q What did Mr. Pennick say to you when you said the $50,000 wasn't enough?

A That he would look into it.

Q Did he sympathize with you?

A No, he just stated he would look into it.

Q Did you ever indicate to anyone at the Boeing Company that you desired to return to the Boeing Company after your term of government employment?

A I may have.

Q When was this, sir?

A I beg your pardon?

Q When?

A I don't know.

Q Was it before you agreed to have your name submitted for appointment to the position of Deputy Assistant Secretary of the Navy?

MR. LACOVARA: The witness has just said he doesn't know if he ever made such a suggestion, and also, if he did, he doesn't know when.

MR. TERLEP: He said he may have. I'm [71] trying to refresh his recollection.

MR. LACOVARA: You may answer the question, if you have any recollection, Mr. Kiston.

THE WITNESS: I would not have said it after I agreed to have my name submitted.

BY MR. TERLEP:

Q Do you have any recollection that you said it at any time before that time?

MR. FENDRICH: I'm sorry, we just had a momentary disconnection. I would like to ask if you would please recapitulate about the last 10 or 15 seconds, whether it be a question or an answer.

BY MR. TERLEP:

Q Mr. Kitson, are you on the line?

A Yes, I am.

MR. FENDRICH: Could I just ask that the reporter perhaps read back the last 10 or 15 seconds of testimony?

MR. TERLEP: Certainly.

MR. FENDRICH: Listen, I'll tell you what, the call that we just received which cut us off for about 10 seconds is apparently from Amy Berman, [72] who has lost her connection.

MR. TERLEP: I see. I don't know what we do to get her back. Do you know what we do to get her back?

[Briefly off the record]

MR. TERLEP: I have no objection to the reporter reading that back.

[The record was read back from the following question:

"Q Did you ever indicate to anyone in the Boeing Company that you desired to return to the Boeing Company after your term of government employment?"]

MR. LACOVARA: Why don't we pick up from the pending question, if the reporter will read that back. Is that all right with you, Mr. Terlep?

MR. TERLEP: That's fine.

[The following question was read back:

"Q Do you have any recollection that you said it at any time before that time?"]

MR. LACOVARA: Mr. Kitson, you may answer that pending question, if you can.

[73] THE WITNESS: I may well have said something about returning to Boeing. If so, it was an effort on my part to part from Boeing on good terms, which, incidentally, might have a beneficial effect on termination payment. I had no serious intent to return to the Boeing Company.

BY MR. TERLEP:

Q How would it have had an effect on termination payment?

A If the company had a good feeling about me from the parting being amiable.

Q Is that your answer?

A That is.

Q Did you think that they would treat you any different if you represented to them that you weren't coming back to the Boeing Company after your government employment?

A I don't know, since I don't know how they calculated the termination pay.

Q Why did you think that a statement about whether or not you'd return to the Boeing Company after completing your government service would have [74] an impact on your termination pay?

A It would just assure that we were parting on good terms and hence might, subjectively, impact their determination, since I didn't now how it was determined, how much was subjective and how much was calculated.

Q Your last answer faded in and out. Could you repeat it, sir?

A I believed that parting on good terms was a good idea, and incidentally that it might have an impact on their determination of termination pay.

Q That it might have an impact on the dollar amount of the termination pay or on the fact that they would make a termination payment to you?

A On both—well, on the dollar amount.

Q Let me understand you. Did you think that if you made some indication of your desire to return to the Boeing Company that you would receive more severance payment or more termination pay?

A No, I did not say that.

Q That's what I'm trying to understand. What do you mean, then?

[75] A Just by having an amiable parting that that might influence the termination pay?

Q And by an "amiable parting" you mean by your saying that you wanted to return to the Boeing Company after you completed your government service?

MR. LACOVARA: I object, Mr. Terlap. The witness has never said that he either said that or might have said that. He said that he may have indicated in interest in returning to Boeing not that he ever said that he intended to return to Boeing, if he said anything of the sort.

BY MR. TERLEP:

Q What did you say, Mr. Kitson?

A I don't recall, first, whether I said anything about returning to Boeing. I said that if I did—and I explained the reason why I would have.

Q The reason is still not clear to me, sir.

MR. FENDRICH: Well, I think Mr. Kitson explained it at least twice by now.

MR. TERLEP: If Mr. Kitson is willing to stand by his answer, so am I.

MR. FENDRICH: Let's move on.

[76] BY MR. TERLEP:

Q Did you see any document that was prepared by anyone at the Boeing Company with regard to your termination pay or severance payment?

A No.

Q Did you have any discussions with Mr. Miller, Mr. Mark Miller, regarding any payments to be made at the time of your termination?

A I don't recall whether I spoke to Mark about the dollar amount. I spoke to him in the days before I left.

Q About severance payment?

A No, leaving.

Q About leaving. Did you speak to anyone at Boeing about anything that might be considered by the Boeing Company to be accorded to you if and when you returned to the Boeing Company?

A I discussed with Paul Turner the difference between resigning and retiring.

Q Did you discuss anything about whether or not your relocation costs would be paid by the Boeing Company if you returned to Boeing after your [77] government service?

A That may have been discussed in connection with the option of resigning as opposed to retiring. I retired.

Q Did you have any discussions with Robert Benson about any payments to be made on the occasion of your termination from Boeing?

A You would have to refresh my memory as to the position that Benson had.

Q Do you know who Robert Benson is?

A I don't remember.

Q Did you talk to anyone at the corporate level of industrial relations about payments to be made to you, termination payments or severance payments?

A I don't believe so.

Q When you terminated from Boeing, what was that date, sir?

A August 1st, 1982.

Q August 1st.

A August 1st, 1982.

Q Did you receive your severance payment on [78] or about that date?

A Yes.

Q Did you receive any other payments on or about that date from the Boeing Company?

A The savings plan amount and the sick leave, accumlated sick leave payments, somewhere around then—but I think it was several weeks subsequent to the retirement.

Q What was your understanding of why you received these payments other than termination pay or severance pay?

A Would you clarify what you mean by "these payments"?

Q How many other payments did you receive?

A I received the savings plan, the financial—I forget what they called it.

Q The financial security plan?

A The financial security plan.

Q Did these come in separate checks, payments relating to each of these plans come in separate checks, or were they in one check?

A I don't recall whether it was a single [79] check or multiple checks.

Q Was it a check different from the check you received for severance payments?

A Yes, it was.

Q And these were received some time after August 1st, 1982?

A I believe that is correct.

Q Did you receive—I guess I should have asked it a little more precisely—did you receive the severance payment check before you terminated your employment with the Boeing Company or on your last day?

A I received it before I left Boeing, before August 1st.

Q Do you recall how many days before August 1st?

A It could have been one or two days—it was one or two days before.

Q Now, was it your understanding that the payments that you received other than your severance payment had

to do with amounts that had accrued to various accounts in your name with the Boeing Company [80] prior to your leaving the Boeing Company?

A Yes.

Q And were those amounts based upon prior service to the Boeing Company, amounts that had accrued as a result of prior service to the Boeing Company?

A Yes.

Q Did your severance payment have to do with amounts that had accrued to you as a result of your prior service with the Boeing Company?

MR. LACOVARA: If you know.

THE WITNESS: I don't know the basis for the calculation of the severance payment.

BY MR. TERLEP:

Q Did you consider the amount of severance payment that you received to be associated with any amounts that you had accrued as a result of your prior employment with the Boeing Company?

A I believed it was a result of my prior service with the Boeing Company, yes.

Q You mean that you received the severance payment as a result of your prior service with the [[81] Boeing Company?

A Yes.

Q Did you believe that it was calculated with reference to anything that had already accrued to you as a result of your employment with the Boeing Company?

A I do not know how it was calculated.

Q Did you believe that it was calculated with reference to the factors that you had submitted to them on the document which listed your financial losses that we referred to earlier?

A It certainly was not closely related, since it was significantly less.

Q Would you have left the Boeing Company if you had not received a severance payment?

A Yes.

Q Where would you have gone if you had not received a severance payment? Would you still have taken a position with the United States government?

A Either with the United States government or another company.

Q But if on the day you were to walk out [82] the door with the Boeing Company on August 1st, 1982, Boeing said we weren't going to make the severance payment to you, would you have left on that day?

A At this time I couldn't speculate on what I would have done.

Q Did anyone in the Boeing Company ask you to disqualify yourself from dealing with any particular matters relating to Boeing after you entered the employment of the United States?

A No.

Q Did you in fact disqualify yourself from dealing with Boeing matters at any time after you became a government employee?

A I did.

Q When was that, sir?

A Approximately the third week in September.

Q And why did you do that?

A It is a requirement to do so. I was advised by the Navy attorneys, one of whom was Ted Tate, and I can't recall the name of the other one.

Q Could it have been Joseph Duffy?

[83] A Duffy, yes.

Q Did you discuss the severance payment you had received from the Boeing Company with either of those individuals?

A Not that I recall.

Q Did you discuss any payments that you had received from the Boeing Company with those individuals?

A Not that I recall.

Q Did Tate say anything to you at any time, either before you became a government employee or after you

became a government employee, about severance payments?

A Not that I recall.

Q Did you receive any document from any employee of the United States concerning severance payments?

MR. LACOVARA: "Concerning" meaning referring to severance payments?

MR. TERLEP: Discussing, referring to—anything.

MR. LACOVARA: Well, it's the [84] "anything"—I think it's a little bit too open-ended. So I will object as to form.

BY MR. TERLEP:

Q Can you answer the question, sir?

A Not that I recall.

Q You don't recall receiving any such document.

MR. LACOVARA: Objection, same objection. I don't know what the question means, and I don't know how the witness can.

MR. TERLEP: He already answered it. It sounded like he answered it to me. Perhaps I can ask it another way.

BY MR. TERLEP:

Q Did you receive any document from any employee of the United States that discussed the issue of severance payments?

MR. LACOVARA: That's a very different question and I'm glad to have the witness answer it.

THE WITNESS: Not that I recall.

BY MR. TERLEP:

Q Were you required to submit a financial [85] disclosure form to the government?

A I was.

Q Did you do so?

A Yes.

Q How many such forms did you submit during the time that you were a government employee?

A Three or four.

Q Three or four?

A Yes.

Q On any of those forms did you list the severance payments that you received from the Boeing Company?

A I included the severance payment in a line which was marked "Boeing salary," because the directions on those forms indicate—and I can't recall the exact wording—but indicate that you should lump together those things which are treated as ordinary income, or something to that effect.

Q But you did not identify it as a severance payment.

A No.

Q Were you ever asked to identify severance [86] payments that you had received from the Boeing Company by anyone in the government?

A No.

Q Did you in fact inform anyone in the government that you had received a severance payment from the Boeing Company?

MR. LACOVARA: The government, other than the Internal Revenue Service, Mr. Terlep?

MR. TERLEP: All right, we'll do it that way.

THE WITNESS: Only in the sense that I included it in the disclosure form in a lump sum with the Boeing salary.

BY MR. TERLEP:

Q But it was not identified as a severance payment in those forms, is that right?

A No.

Q Now, did you identify the sum of the severance payment on any communications you had with the Internal Revenue Service as a severance payment?

A No.

Q Did you have an occasion to make any [87] changes to any financial disclosure form that you submitted to the government after the time that you first submitted that form, any particular form?

A I don't recall having done so.

Q Did you ever make a statement to Mr. Tate denying that you had received a severance payment from the Boeing Company?

A No.

Q Did you ever make a statement to Mr. Tate denying that you had received relocation costs from the Boeing Company?

A As far as I know, Tate never asked me about moving costs. I did not receive any moving costs from the Boeing Company.

Q Did there come a time in 1982 that you became a consultant to the United States in any capacity?

A Yes, I was a consultant to the Department of Navy from approximately August 2nd or 3rd until the end of August.

Q Were you a consultant with the United States government at any time that you were a Boeing [88] employee?

A I was not.

Q When did you receive notification that you had been accepted to be a consultant with the United States?

A I don't recall exactly. Approximately August 1st.

Q Do you know why you were apointed as a consultant to the United States?

A Because the tentative offer as Deputy Assistant Secretary of the Navy was contingent upon White House approval and upon DOD approval. When I left Boeing those approvals had not been granted, and Mr. Paisley wanted me to come back and help in that position in a consultant capacity until and if approval was received.

Q Did you suggest the consultancy or did he?

A I believe he did.

Q When did he do that?

A I believe near the end of July.

Q While you were still a Boeing employee?

[89] A Yes.

Q Mr. Kitson, do you recall receiving a letter from Mr. Tate during July 1982 having to do with the issue of severance payments?

A No, I don't.

Q When you left the Boeing Company August 1st, 1982, on or about that date, did you expect to be employed by the United States in the capacity as Deputy Assistant Secretary of the Navy?

A I assumed there would be no reason for the tentative offer to be rejected by the White House nor the DOD.

Q It was your understanding that it had to be approved at that level, is that correct?

A I certainly did.

Q And when did your appointment become final?

MR. LACOVARA: Object, that's a question of law. I will direct the witness not to answer it.

BY MR. TERLEP:

Q Were you ever informed that you had been formally appointed to that position and the [99] appointment had been approved?

MR. LACOVARA: Those are two questions, and they are legally different issues, Mr. Terlep. Again, I will object and direct the witness not to answer the question as you've put it.

BY MR. TERLEP:

Q Did you ever learn that your appointment had been approved to the position of Deputy Assistant Secretary of the Navy?

MR. LACOVARA: His proposed appointment--I will let him answer that question as modified, if you will take it.

BY MR. TERLEP:

Q Fine, can you answer it, Mr. Kitson?

A Yes, I learned it in two steps. I learned that the White House had approved it, and then subsequent to that I learned that the DOD had approved it.

Q When did you learn that the White House had approved it?

A Approximately the end of August or early September. We started driving across country, I [91] believe it

was September 1st, and so we were somewhat out of communication.

Q Did you serve as a consultant to the Department of the Navy while you were still living in Seattle?

A While my residence was still in Seattle, yes.

Q Did you ever come to Washington, D. C., to serve as a consultant during the month of August, 1982?

A Yes, every week.

Q How many days did you serve as consultant during August of 1982?

A Approximately twenty.

Q Did you come by airplane to Washington during that time?

A Yes.

Q Who paid for your airplane tickets?

A The Department of Navy.

Q Did they pay for your expenses as well?

A Yes.

Q Did Boeing pay you during August of 1982?

[92] A They did not.

Q Let me clarify that: I meant August of 1982, not August of 1980 also.

MR. LACOVARA: Would you repeat the question, please, Mr. Terlep.

MR. TERLEP: Sure.

BY MR. TERLEP:

Q Did the Boeing Company make any payments to you during August 1982?

MR. LACOVARA: Let me interject a clarification here. The witness said he may have received some payments relating to his retirement.

BY MR. TERLEP:

Q Other than the payments that you previously testified to about retirement.

A I did not receive any payments other than those related to retirement.

Q Did you subsequently resign from your position as Deputy Assistant Secretary of the Navy?

A Yes.

Q When was that, sir?

A June 21st, 1985.

[93] MR. TERLEP: That's all I have at this time.

MR. FENDRICH: Okay, I've got a few questions. This is Roger Fendrich.

EXAMINATION BY COUNSEL FOR DEFENDANTS MELVYN R. PAISLEY, ET AL.

BY MR. FENDRICH:

Q Mr. Kitson, did Boeing ever inform you, either orally or in writing, that the award of a severance payment to you would be conditional upon your remaining in government for a particular period of time?

A Never that I recall.

Q Did they ever inform you that the award of a severance payment would be conditioned upon your remaining in a specific position in government?

A Never that I recall.

MR. TERLEP: Excuse me, Mr. Fendrich, who is the "they" that you are referring to? Is it the Boeing Company?

MR. FENDRICH: The Boeing Company.

MR. TERLEP: And how do you define the [94] Boeing Company?

MR. FENDRICH: The Boeing Corporation or indeed any agent of the Boeing Corporation.

BY MR. FENDRICH:

Q Is it understood, Mr. Kitson?

A Yes.

Q Did Boeing ever inform you that your severance payment would be conditioned upon your remaining at a particular salary level within the government?

A No.

Q Did Boeing ever inform you that the severance payment would be conditioned upon a commitment on your part to return to work at Boeing at the completion of your government employment?

A No.

Q Did Boeing ever condition the severance payment on your giving Boeing preferential treatment while you were in government service?

A No.

Q Did Boeing ever commit itself to rehiring you after your government service was completed?

[95] A No.

MR. TERLEP: I object to the form of that question. I don't know what time period you are asking him about.

BY MR. FENDRICH:

Q Prior to the time or around the time that you received the severance payment that's in question in this case, did Boeing commit itself to rehire you when you completed your government service?

A They did not.

Q Mr. Terlep asked you about your financial disclosure report that you filed with the government.

A Yes.

Q Do you believe that you complied with all the requirements associated with the financial disclosure report?

A I do.

Q Do you recall whether the financial disclosure report that you filled out had an instruction which made a specific request that a severance payment be separately identified on that form?

A I know that there was no direction on [96] that form to report severance pay separately.

MR. FENDRICH: Thank you, that's all I have.

MS. BERMAN: On behalf of Mr. Crandon, I have no questions.

MS. WETZEL: This is Wetzel for the Boeing Company. I have no questions.

MR. LACOVARA: Any redirect, Mr. Terlep?

MR. TERLEP: Just one question about the document that was submitted to the Boeing Company which included the factors or Mr. Kitson's analysis of his estimated financial loss.

FURTHER EXAMINATION BY COUNSEL
FOR THE PLAINTIFF

BY MR. TERLEP:

Q Did you submit more than one such document to the Boeing Company?

[Pause]

Mr. Kitson?

A I'm trying to recollect. I believe I did.

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GOV. EX. 128

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION OF LAWRENCE H. CRANDON

Washington, D.C.
Thursday, November 13, 1986

• • • •

[17] Q What did you tell the individuals at Boeing about the job offer that you had received?

A I told them about the offer, what the position was, where it was going to be, etcetera—all the details that were in the letter.

Q Did you tell them how much you were going to make?

A Yes.

Q Yes?

A Yes.

Q Did you tell anyone at the Boeing Company about the financial considerations that were in your mind about leaving the Boeing Company or about taking government employment?

A Yes.

Q When was that?

A I don't know, around the fall of 1981.

Q Was it shortly after you received the government's—

A I don't recall whether it was before or [18] after.

Q —offer of employment?

A I don't recall whether it was before or after I received the offer of employment.

Q But it could have been before you received the offer of employment?

A I don't recall.

Q What were the financial factors that you communicated to the Boeing Company?

A The financial impact on my leaving the Boeing Company.

Q Would you explain what you told them about the financial impact?

A I'm not exactly sure what I told them. The financial impact was I would not have a full vested interest in my pension, the voluntary investment plan would cease—they have a voluntary investment at Boeing, which I was a member of. And obviously when I left Boeing that would end.

Q Are there any other factors that you can recall?

A I can't recall any others, but I'm sure [19] there were others.

Q Was one of the factors the difference between the salary that you were making at the Boeing Company and the salary you expected to receive with the United States government?

A Yes.

Q Did you make any specific request to the Boeing Company about their making a payment to you to make up the difference between your Boeing salary and your expected government salary?

A No.

Q No, you did not?

A No, I did not.

Q Did you discuss—were you aware of any policy or practice of the Boeing Company to make severence payments to its employees?

A No.

Q You were not?

A No, I was not.

Q Have you subsequently become aware of a policy or a practice at the Boeing Company to make severance payments to its employees?

[20] A Yes.

Q When did you become aware of that?

A When it was indicated to me that I would get a severance payment.

Q Who indicated it to you?

A Somebody from the industrial relations department.

Q Do you recall that person's name?

A No.

Q When was that indicated to you?

[Pause]

Did you hear my question, sir?

A No, I'm sorry, I didn't hear the question.

Q When was that indicated to you?

A Could you repeat the subject of the question, please. Hold the line for just a moment, please—I'm having a problem here.

[Pause]

If you could repeat the subject of the question, and the question again, please.

Q When did someone at the Boeing Company [21] first discuss with you the issue of a severance payment?

A The latter part of 1981.

Q In relation to the date that you received your offer of employment, was it before or after that date?

A I don't recall.

Q Was it before or after the date that you made up your mind to accept the appointment?

MS. BERMAN: The offer?

BY MR. TERLEP:

Q The offer of employment.

A Repeat the question, again.

Q Was it before or after the date that you determined or decided to accept the offer of employment?

A I don't recall.

Q What was said during that conversation about severance payments?

A Nothing was said—well, I was told I might receive a severance payment. There was no further discussion, as I remember.

[22] Q Did you understand at that time what the words "severance payment" meant?

A I believe I did.

Q What did you think that severance payment included?

A I believe it included—well, you mean what comprised it?

Q That's correct.

A I don't know what comprised the severance payment.

Q You did not know at that time what comprised a severance payment that the Boeing official was talking to you about?

A That's right.

Q Did they ask you to submit anything to them about your financial losses?

A They asked me to submit a statement of financial impact upon me.

Q And did you do that?

A I did.

Q And what did that statement include?

A All the factors that I could think of [23] that would have a financial impact on me by leaving the Boeing Company.

Q When was the last time that you saw that statement?

A In the latter part of 1981.

Q You've not seen it since that date?

A No.

Q Did that statement have on a discussion of any factor relating to the difference between your Boeing

salary and that salary which you expected to receive from the government?

A I don't know; I don't remember. It had many factors—I don't remember.

Q Do you recall any of the factors?

A I can't recall any specific factors.

Q Perhaps I can refresh your recollection. Did any of the factors have to do with amounts that you might lose in the voluntary investment program?

A Yes.

Q Can you recall what those factors were?

A Not what the factors were; I'm sure it included the fact that I would not be in the [24] voluntary investment program.

Q Did you include a factor about payments of any funds relating to the voluntary investment program over the time that you would be a government employee?

MS. BERMAN: I don't understand that question.

BY MR. TERLEP:

Q Do you understand the question, Mr. Crandon?

A No.

Q Did one of the factors that you submitted on this document that you submitted to Boeing, was one of those factors relating in any way to the amount of money which might be paid to you through the voluntary investment program—

A I don't recall.

Q Let me finish the question:—for a time in the future?

A I don't recall.

Q Is there a factor that had to do with Boeing's financial security program?

[25] A I don't recall.

Q Is there a factor having to do with relocation costs?

A No.

Q Did you have any discussions with anyone at the Boeing Company about conflicts of interest?

A No.

Q Did you subsequently receive a severance payment from the Boeing Company?

A Yes, I did.

Q In what amount?

A $40,000.

Q And what was the date that you received it?

A It was toward the beginning of March; I don't know the exact date.

Q Was it on the date that you resigned your employment from Boeing?

A I believe it was that date.

Q It was around the time that you left. Was it after the date that you left?

A No.

[26] Q Did you receive any other payments from the Boeing Company at or around the time that you terminated your employment with Boeing?

A I received my salary; I received the money I had invested in the VIP plan, the money that was my share. I can't recall any other amount.

Q Did you receive any money relating to vacation time?

A I don't recall.

Q How many checks did you receive at the time that you terminated your employment with Boeing?

A I don't recall the exact number.

Q Were you paid in cash? I presume the payments were by check, were they?

A That's correct.

Q Did you receive the disbursements from your voluntary investment plan at the time that you left Boeing or did you get a check later regarding those amounts?

A I received in those last few days, all the—whatever checks I received from the Boeing Company were received in those last few days.

[27] Q Did you receive any checks after you terminated your employment with Boeing?

A Before I left the Boeing Company.

Q None afterwards?

A None afterwards.

Q Did you have any discussions with any member of the United States government, having to do with the payments that you received from Boeing at the time that you terminated your employment?

A Before I left Boeing?

Q Any time.

A Yes, I had a conversation in I believe it was some time in 1982 or 1983 with somebody who I believe worked for the FBI at NATO headquarters.

Q Do you recall that person's name?

A No, I don't recall.

Q What was discussed during that conversation?

A He asked me—I really don't recall the conversation. He asked me several questions, and I answered them, and I'm sure it was about my employment with the ACCS team.

Q After the time that Boeing informed you that might receive a severance payment, did you discuss that possibility with anyone inside the United States government?

A No.

Q What did you consider the severance payment to be?

A Something that would completely sever relations between Boeing and myself.

Q Did you understand it to include the monies that you had contributed to the voluntary investment program over the years?

A I don't know what it included.

Q Did you consider those monies to be included among the $40,000?

A I didn't engage in those speculations.

Q Did you have any thoughts at the time that you received that $40,000 about why you were getting it?

MS. BERMAN: I believe he's answered that question: What did you consider a severance payment [29] to

be? It completely severed my relationship with Boeing. He doesn't know what's included. And he didn't engage in any speculation as to what was considered.

MR. TERLEP: He hasn't testified to that.

MS. BERMAN: I didn't hear your response.

BY MR. TERLEP:

Q Mr. Crandon, there's a pending question to you.

MS. BERMAN: For the record, I object to the question, but I think the reporter should read it back before Mr. Crandon should have to answer it.

MR. TERLEP: Okay.

[Pending question read back]

BY MR. TERLEP:

Q Would you answer the question, Mr. Crandon?
A I don't remember what thoughts I had on it.
Q Did you know how the $40,000 was calculated?
A No, I do not.

[30] Q Did you know what factors Boeing took into consideration in determining the amount of severance payment to be made to you?

A No, I do not.

Q Did anyone at the Boeing Company discuss the factors that Boeing would consider in determining the amount of severance payment to be made to you?

A No.

Q Did anyone at the Boeing Company ask or tell you or suggest to you that you might disqualify yourself from dealing with Boeing matters while you would be a government employee?

A No.

Q Either before or after you left the Boeing Company?

A That's right.

Q Did you in fact disqualify yourself from dealing with Boeing matters after you entered the United States government?

A I don't recall.

Q Did you disclose to anyone in the United States government the fact that you had received a [31] severance payment from the Boeing Company?

A The FBI agent, the only person I discussed it with working for the U. S. government.

Q Were you required to submit a financial disclosure form to the United States government in your position?

A I don't recall.

Q Do you know what a financial disclosure form is?

A I'm not sure.

Q Have you ever made a report of your financial position, including your income, stockholdings, real estate holdings, bank accounts, that sort of thing, to the United States government?

A No.

MS. BERMAN: Just to make the record clear, the question seemed to imply that such a disclosure was required, and I don't believe that's true in Mr. Crandon's case. If it was required, he can answer whether or not he filled out anything he had to fill out. But I'm a little concerned about the tone of your question.

[32] MR. TERLEP: Well, the tone of my question wasn't meant to imply an requirement. I was just asking him whether he did so. The law will be able to tell us whether he was required to submit it or not. Quite frankly, I don't know whether he was required to submit it.

BY MR. TERLEP:

Q When you entered your current position, did you sign a contract of employment with the United States?

A I don't remember.

Q Did you make any commitment to remain with the United States at that time for any period of time?

A I was hired with the understanding that I would be employed for two years with an option for a third year.

Q. And with whom did you have this understanding?

A With the people who hired me, Dr. Quinn and Dennis Marquis.

Q When did this understanding come about?

[33] A I believe it was in the letter of offer.

Q That would have been in the fall of 1981?

A That's correct.

Q Now, you've stayed in that position longer than two years, have you not?

A That's right.

Q Did you need to be reappointed to that position at the end of the initial two years?

A My tour had to be extended; I don't know if they call it "reappointment" or not.

Q Was it extended by an official offer to you or some type of offer to you in writing to extend your current position?

A Yes.

Q And did you accept that?

A Did I accept it?

Q Yes.

A Yes.

Q Now, getting back to something I asked a little while ago to clarify something. The person in the personnel department that you spoke to about your financial losses and about the severance payment, was [34] that in the Boeing Company corporate headquarters?

A Boeing Aerospace Company.

Q Is there such a thing as an AWACS, A-W-A-C-S, branch of Boeing Aerospace Company?

A I believe so; I'm not sure how it's organized now.

Q At the time that you were employed there, was there such a branch?

A There was an activity; I'm not sure it was called a branch.

Q Did you inform anyone in any entity known as the AWACS branch at the Boeing Company about anything having to do with the termination of your employment or severance payments?

A Could you repeat question, please.

Q Rather than have the reporter read it back, I'll try to rephrase it. Did you communicate anything to any-

one in an entity known as the AWACS branch at the Boeing Company about the termination of your employment, about your accepting government employment, or about severance payments?

[35] A Yes—but not about severance payments.

Q But not about severance payments.

A I communicated to people in the AWACS entity that I had received an offer from the government.

Q Why did you do that?

A Because they should know that I was thinking of leaving.

Q Were you employed by that branch?

A Yes.

Q Yes?

A Yes.

Q I see. Did you ask anyone in the AWACS branch if anything could be done for the loss in salary that you were going to suffer as a result of leaving the Boeing Company and entering government employment?

MS. BERMAN: Object.

THE WITNESS: No.

MS. BERMAN: Asked and answered. He's answered it again.

MR. TERLEP: I never asked him about the [36] AWACS branch, Ms. Berman.

MS. BERMAN: You asked anyone at Boeing. I assume that the AWACS branch is a part of the Boeing Company?

MR. TERLEP: I didn't know until just now.

MS. BERMAN: At any rate, he's answered the question no both times.

BY MR. TERLEP:

Q Did you have any communication with Mr. Hagberg? Do you know who he is?

A No.

Q About this issue?

MR. FENDRICH: Objection.

THE WITNESS: I didn't hear you.

Q About your termination from the—let me start the question over again.

MS. BERMAN: You had an objection, Mr. Fendrich?

MR. FENDRICH: My objection is that that was a compound question.

MR. TERLEP: Yes, I'm about to break it [37] up.

MR. FENDRICH: Why don't you break it into parts.

MR. TERLEP: I will.

BY MR. TERLEP:

Q Mr. Crandon, do you know who C. P. Hagberg is?

A No.

Q Do you know who Robert S. Benson is?

A No.

Q Did you ever have any contact with anyone from an entity known as the Defense Criminal Investigative Service regarding your severance payment?

A No.

Q Do you know if a copy of the submission that you made to the Boeing Company regarding your financial loss exists today?

A I don't know.

Q Do you have a copy of it?

A No, I don't.

Q When you resigned from the Boeing Company, did you fill out any documents or sign any papers [38] at the time that you left Boeing?

A Yes.

Q What were those papers?

A I don't recall exactly, but I think there was a resignation statement.

Q Did you sign any statement that said something to the effect that you were not to consider the severance payment being made to you as an inducement to return to the Boeing Company?

A Could you repeat the question again.

Q Did you sign any document when you left the Boeing Company which stated something to the effect

that you were not to consider, and you did not consider, the receipt of the severance payment made to you by Boeing an inducement to return to Boeing's employment?

MS. BERMAN: I mean, just back off a second and ask him if he signed any document related to the severance payment. That may obviate this confusing question.

BY MR. TERLEP:

Q Was the question confusing to you, Mr. Crandon?

A Yes, it's long and involved; I'm not sure I follow it.

Q Did you sign any documents that discussed in any way the severance payment or the termination payment made to you by the Boeing Company?

A No.

Q Did you indicate to anyone at the Boeing Company that you would like to return to the Boeing Company after your term of government service prior to your leaving Boeing?

A I don't remember.

Q Did anyone at the Boeing Company discuss anything with you about your return to the Boeing Company after government service?

A No.

Q That prior question, I meant to put a time frame on it. Did any of these discussions occur prior to your leaving the Boeing Company?

A No.

Q Did you have any expectation at the time that you left the employment of the Boeing Company [40] and entered government service that you would be rehired by the Boeing Company at any time in the future?

A I had no expectations; I expected to seek employment in the aerospace industry when I finished my work for the government. Boeing would be one of the companies that possibly could use my services as well as many others. I had no expectations of going back to Boeing.

Q When you were being interviewed, or any time prior to the time you left the Boeing Company, where you were being interviewed or discussing the job offer with anyone in the United States government, did you have any negotiations about what salary you would receive?

A No.

Q Did you ask to be placed at a particular salary level?

A No.

Q Did you know whether or not anyone in the government took any action with regard to your salary level prior to the time that you took your [41] appointment?

A I don't know what you mean, any action with regard to my salary level.

Q Did you know what salary was paid to a person in your position?

A I know what salary was being offered me, yes.

Q What was that?

A At the time around $50,000 a year.

Q Was it part of the GS schedule?

A That's correct.

Q Do you recall what the GS schedule grade and step was?

A It was a GS-15.

Q Do you recall what step within a GS-15?

A No, I don't.

Q What step are you now?

A 10.

Q A 10?

A Yes.

Q Have you been a 10 since you entered government service?

[42] [Pause]

Did you hear the question, sir?

A Yes. I don't know whether I was a 10 which I first entered—I'm not sure.

Q Do you know whether you were a step 1 when you first entered?

A No, I was not a step 1.

Q Were you higher than a step 5 in GS-15?

A I'm not sure.

Q Would you have resigned from the Boeing Company to accept this position if Boeing had not made the severance payment to you?

A Repeat the question, please.

Q Would you have resigned from the Boeing Company to accept this position if Boeing had not made a severance payment to you?

A Yes, I would have resigned—yes.

Q Were you planning on leaving Boeing anyway at that time regardless of the offer of government employment?

A I had no special plans.

MR. TERLEP: I have nothing further.

[43] MS. BERMAN: Mr. Crandon, I just have one or two questions for you.

EXAMINATION BY COUNSEL FOR DEFENDANT LAWRENCE H. CRANDON —

BY MS. BERMAN:

Q Mr. Crandon, were you advised that the severance payment you received from Boeing was contingent upon your remaining in the government for a certain number of years?

A No.

Q Were you told that you had to remain in a particular position in the government to keep your severance payment?

A No.

Q Were you told that you had to maintain a particular salary level to keep your severance payments?

A No.

Q Were you told by Boeing that the receipt of your severance payment was contingent upon your according preferential treatment to Boeing while you were in the government?

[44] A No.

Q Were you told that the receipt of the severance payment was contingent upon your returning to Boeing on some future date?

A No.

Q Did you in fact receive any commitment or promise that you would be re-employed by Boeing before you left?

A No.

Q Have you in fact accorded any preferential treatment to Boeing while you were in government service?

A No.

Q Did you view the severance payment as compensation for your government service?

A No.

Q Did you view it as a supplement to your government salary?

A No.

MS. BERMAN: No further questions. Mr. Fendrich?

MR. FENDRICH: No questions.

[45] MS. WETZEL: Ms. Wetzel on behalf of the Boeing Company; I have no questions.

[Whereupon, at 2:13 p.m., the taking of the deposition in the above-entitled matter was concluded]

* * * *

BOEING EX. 6

THE BOEING COMPANY
Seattle, Washington 98124

July 26, 1973

J E PRINCE
Senior Vice President

Mr. Jack Stempler
General Counsel
Department of the Air Force
The Pentagon
Washington, D.C. 20330

Subject: Mr. Frank Shrontz

Dear Mr. Stompler:

As discussed in our telephone conversation just concluded, I am enclosing a draft of a letter that I would propose to write to you regarding the above subject. After you have had an opportunity to review it I would like to discuss it with you. My telephone number is: A.C. 206 655-2538.

Sincerely,

/s/ J. E. Prince
J. E. PRINCE

Enclosure

HEADQUARTERS OFFICES [Illegible]

July 25, 1973

Mr. Jack Stempler
General Counsel
Department of the Air Force
The Pentagon
Washington, D.C. 20330

Dear Mr. Stempler:

There have been discussions with us regarding the possible apointment of Frank Shrontz, an employee of The Boeing Company, as Assistant Secretary of the Air Force for I&L. Mr. Shrontz has been interviewed on four occasions by representatives of the DoD or the Air Force regarding possible apointments and it has just come to my attention that in discussions last week a question was raised regarding any termination settlement he might receive from The Boeing Company. I understand Mr. Shrontz reported The Boeing Company had discussed this matter with him and advised him that if he decided to resign from The Boeing Company to take an important position with the Government such as the Assistant Secretary of the Air Force for I&L, that The Boeing Company would make a termination settlement with him for $62,500. I am told that he was advised that if the amount of this termination settlement was based on pay differential between his income had he stayed with The Boeing Company as compared to his prospective compensation from the Air Force that it might violate Section 209 of Title 18 of the U.S. Code. Mr. Shrontz, I understand, reported that he did not know the basis on which the Company had determined the proposed termination settlement.

We think the Air Force should be aware of the position of The Boeing Company on this matter so that if there

is any question regarding the propriety or legality of the proposed termination settlement the matter can be resolved before any decision is made. In arriving at the proposed termination settlement, various factors were taken into account, including his past service with the Company and a rough estimate of the differential of overall benefits that might accrue to Mr. Shrontz if he remained with The Boeing Company over the next three and one-half years as compared with his taking this possible position with the Air Force. The amount of the proposed termination settlement is substantially less than the monetary loss Mr. Shrontz would probably incur by reason of his accepting this possible position with the Air Force. The termination settlement, if made, would be paid or possibly arranged for in part by a letter of credit from a Bank prior to his becoming an employee of the U.S. Government and would not be contingent in any way either on his remaining with the Government for any period of time or upon his returning to Boeing following his tour of service with the Government. It is our view that under these circumstances this would not conflict with the above-mentioned Section of the U.S. Code.

Very truly yours,

THE BOEING COMPANY

J. E. PRINCE,
Senior Vice President

cc: Frank Shrontz

BOEING EX. 7

May 18, 1967

Paul Dembling
General Counsel
NASA

Dear Mr. Dembling:

As you know, I have been offered the position of Deputy Associate Administrator for Engineering in the Office of Space, Sciences and Applications of the National Aeronautics and Space Administration. In this connection, counsel for my present employer, The Boeing Company, has called to my attention the provisions of the "Federal Conflict of Interest Statutes", including specifically sections 208 and 209 of Public Law 87-849, and indicated to me that before accepting such appointment it would be advisable for me to correspond with you and disclose to you certain facts concerning my termination of employment with Boeing.

In the event I am appointed to the above mentioned position, my employment with Boeing and all subsidiary and affiliated companies of Boeing will be terminated on the following basis:

1. My resignation from employment with Boeing will be made effective prior to my commencing service with NASA. Upon such resignation becoming effective, I will have no rights to further salary or compensation, right of re-employment, or other continuing rights as a result of my prior employment with Boeing except for,

   a. The right upon reaching the retirement age defined in Boeing's retirement plan to receive certain retirement benefits, the amount of which will be based on the period of my employment with Boeing prior to my resignation and my rates of compensation during such period.

   b. The right to receive, promptly after my resignation, the amounts accrued to my account under Boeing's Financial Security and Savings Plans.

   c. A severance payment in a total amount of $26,000. For personal reasons, I have requested, and the Company has agreed, to make such payment in three installments, as follows:

      $ 6,000 on termination;
      10,000 in January, 1968; and
      10,000 in January, 1969.

2. No promises, representations or agreements have been made or will be made between me and Boeing or any of its subsidiaries or affiliated companies with respect to any possible future employment of me.

3. I own the following stock in corporations which I may retain during my period of service with the Government which is registered either in my name or jointly in my name and that of my wife or minor children living with us:

   The Boeing Company

It is my understanding that the Federal Conflict of Interest Statutes should be interpreted under the circumstances outlined herein so as to permit me to accept appointment to the above referred to position and to perform the duties of that position. I would appreciate your confirming if my understanding is not correct.

Very truly yours,

GEORGE H. HAGE
2648 S. W. 167th Place
Seattle 66, Washington

BOEING EX. 8

May 17, 1967

To: George Hage

It is our understanding that you have been offered and have accepted a position with NASA as Deputy Associate Administrator for Engineering in the Office of Space, Sciences and Application, to begin in July of this year, and that you desire to terminate your employment with The Boeing Company effective July 4, 1967.

Your severance pay, computed in accordance with Company practice, will be $26,000 which the Company agrees to pay you as follows:

$ 6,000 at time of termination;
10,000 in January, 1968; and
10,000 in January, 1969

You will also be paid on approximately August 20, 1967, the amounts accrued to your account under the Company's Savings Plan and Financial Security Plan.

The foregoing constitutes the only payments or compensation payable to you by The Boeing Company as a result of and following termination of your employment with The Boeing Company.

/s/ J. E. Prince
J. E. PRINCE
Vice President
Administration

BOEING EX. 9

March 21, 1968

Mr. Leonard Niederlehner
General Counsel
Department of Defense
The Pentagon
Washington, D.C.

Dear Mr. Niederlehner:

Pursuant to our telephone conversation yesterday, you will find enclosed copy of proposed letter to Mr. Ben T. Plymale from The Boeing Company describing the severance payments The Boeing Company will make to Mr. Plymale following his termination of employment.

Also enclosed is draft of proposed form of letter from Mr. Plymale to address to you advising you as to the basis of his termination of employment with Boeing. It would be anticipated that you would respond with a letter confirming Mr. Plymale's understanding.

I will not be in the office the week of March 25 but Mr. J. Shan Mullin, one of my partners, is familiar with this matter and you can contact him if it seems desirable. Otherwise, you can call me the week of April 1 if you have any questions concerning this matter.

Very truly yours,

HAROLD F. OLSEN

HFO:nc
Encls.

3/21/68

[Boeing Letterhead]

Mr. Leonard Niederlehner
General Counsel
Department of Defense
The Pentagon
Washington, D. C.

Dear Mr. Niederlehner:

As you know, I have been offered the position of Assistant Director, Strategic Systems, ODDR&E, in the Department of Defense. In this connection, counsel for my present employer, The Boeing Company, has called to my attention the provisions of the "Federal Conflict of Interest Statutes", including specifically Sections 208 and 209 of Public Law 87-849, and indicated to me that before accepting such appointment it would be advisable for me to correspond with you and disclose to you certain facts concerning my termination of employment with Boeing.

In the event I am appointed to the above mentioned position, my employment with Boeing and all subsidiary and affiliated companies of Boeing will be terminated on the following basis:

1. My resignation from employment with Boeing will be made effective prior to my commencing service with DOD. Upon such resignation becoming effective, I will have no rights to further salary or compensation, right of re-employment, or other continuing rights as a result of my prior employment with Boeing except for,

(a) The right upon reaching the retirement age defined in Boeing's retirement plan to receive certain retirement benefits, the amount of which will be based on the period of my employment with Boeing prior to my resignation and my rates of compensation during such period.

(b) The right to receive, promptly after my resignation, the amounts accrued to my account under Boeing's Financial Security and Savings Plans.

(c) A severance payment in the total amount of $26,000. For financial and tax reasons, The Boeing Company has agreed to pay such severance pay to me as follows: $8,000 less withholding tax at time of termination and $18,000 less withholding tax by purchase by the Company of a letter of credit from The Pacific National Bank of Seattle, Washington, pursuant to which the Bank will undertake and commit to pay to me on or after January —, 1969 the sum of $9,600, and to pay to me on or after January —, 1970 the additional sum of $4,800.

2. No promises, representations or agreements have been made or will be made between me and Boeing or any of its subsidiaries or affiliated companies with respect to any possible future employment of me.

3. I own the following stock in corporations which I may retain during my period of service with the Government which is registered either in my name or jointly in my name and that of my wife or minor children living with us:

It is my understanding that the Federal Conflict of Interest Statutes should be interpreted under the circumstances outlined herein so as to permit me to accept appointment to the above referred to position and to perform the duties of that position. I would appreciate your confirming if my understanding in this respect is correct, or advising me if my understanding is not correct.

Very truly yours,

BOEING EX. 10

March 28, 1968

Mr. Leonard Niederlehner
General Counsel
Department of Defense
The Pentagon
Washington, D. C.

Re: Mr. Ben T. Plymale—Termination of Employment by The Boeing Company

Dear Mr. Niederlehner:

During our telephone conversation yesterday the only question you had regarding the enclosures to Mr. Olsen's letter to you dated March 21, 1968 was the matter of the retirement benefits to be paid to Mr. Plymale upon reaching retirement age.

This will confirm that the Company's Retirement Plan is a "funded" type plan. All contributions to the Plan are made by the Company to First National City Bank as Trustee and the Trustee holds, invests and distributes the assets of the Trust as required by the Plan and the Trust Agreement. The Company's contributions are made to the Trustee from time to time during the year so that the assets held by the Trustee will be sufficient to provide the retirement benefits provided under the Plan. In the event the Plan is modified or discontinued, no part of any assets of the Trust will revert to or become the property of the Company or be used for purposes other than the purposes of the Plan prior to the satisfaction of all liabilities under the Plan.

The Plan provides employees with a vested interest in certain of the benefits under the Plan. An employee who terminates prior to retirement age as defined in the Plan

is entitled to such benefits when he reaches retirement age based upon his service prior to termination. The benefits to be paid Mr. Plymale upon reaching retirement age are his vested benefits based upon his service prior to termination.

Enclosed for your information is a copy of a Company booklet entitled "Your Boeing Retirement Retirement Plan".

If you have any further questions regarding this matter, please contact us.

Very truly yours,

J. SHAN MULLIN

JSM:cs
Enclosure

bcc: Mr. A. H. Heiland

BOEING EX. 11

[SEAL]

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
Washington, D. C. 20301

5 April 1968

J. Shan Mullin, Esq.
Holman ,Marion, Perkins, Coie & Stone
1900 Washington Building
Seattle, Washington 98101

Dear Mr. Mullin:

This refers to letters of March 21 and 28, 1968, and our discussions with respect to the separation of Mr. Ben T. Plymale from the Boeing Company to accept an appointment with the Department of Defense.

It is understood that the arrangement between Mr. Plymale and the corporation consist of a total separation. This includes no stock or stock options, no further participation in a company controlled insurance, health or pension program other than his interest in the funded retirement plan administered through its trustee, the First National City Bank. A termination payment in consideration of prior service has been arranged in an amount in line with the company's usual practice based upon seniority, position and service. A partial deferment of the severance payments has been arranged to avoid an excessive tax impact, which deferment is in the form of a letter of credit guaranteeing payment by the Pacific National Bank of Seattle, Washington. The letter of credit is employed to eliminate financial control on the part of the Boeing Company over the deferred payments. In addition Mr. Plymale will be paid the amount accrued to his account under Boeing's savings and financial security plan.

In my opinion the above arrangements constitute compliance with the so-called conflict of interest statutes insofar as Mr. Plymale's relations with Boeing are concerned.

With respect to the retaining of stock in various corporations, registered in either Mr. Plymale's name, jointly with his wife or minor children living with him, consideration must be given to the provisions of section 208 Title 18, United States Code. Under the terms of this statute an employee is prohibited from participating in his government capacity in any matter in which he, his spouse, or minor child has a financial interest. The appropriateness of retention of particular stocks in companies other than Boeing will be discussed directly with Mr. Plymale.

Sincerely yours,

/s/ L. Niederlehner
L. NEIDERLEHNER
Acting General Counsel

BOEING EX. 12

[SEAL]

DEFENSE CONTRACT AUDIT AGENCY
San Francisco Region
Resident Office, The Boeing Company
P. O. Box 3999, M. S. 8R-64
Seattle, Washington 98124

In Reply Refer to CAR-7.10/2-105.213-1 June 3, 1971

The Boeing Company
Attn: Mr. D. Isham, M.S. 84-78
ASG Finance Coordinator

Subject: Severance Pay or Compensation for other than Retirement Benefits or Accrued Leave

Gentlemen:

Please furnish us, relative to above subject, ☒ the information or data described below, ☐ your concurrence or reaction to amounts questioned described below.

As of the date of the employee's termination and for all Seattle Area special payroll employees in pay bracket 5 and above who terminated between January 1, 1967 and December 31, 1970 and who received severance pay or "other compensation" payments for other than retirement benefits or accrued leave, please furnish the following data:

1. Employee's name
2. Job title
3. Annual compensation
4. Organization number and charge number
5. Name and address of new employer (if known)
6. Amount of severance pay

7. Amount of any "other compensation" other than (i) severance pay, (ii) retirement benefits or (iii) accrued leave. For such "other compensation furnish authorization/justification for payment, date paid and accounting distribution.
8. If the employee was rehired by the Company, show date, job title and pay bracket as of date rehired.

Your response should reach us by June 18, 1971. Questions related to this request should be directed to Mr. D. R. Greenway, telephone 773-3417.

Sincerely,

/s/ Donald R. Greenway
for JOHN A. MAHONEY
Resident Auditor

CAR-7.10/53
1-71

BOEING EX. 13

June 8, 1971
2-9450-0000-302

To: A.H. Heiland

cc: G. E. Ablott
D. M. Isham
C. P. Koester

Subject: Severance Pay

Reference: DCAA letter to D. M. Isham, CAP-7.10/2-105.213-1 dated June 3, 1971

The reference letter, copy attached, requests certain data from The Boeing Company. According to oral confirmation by Dick Greenway, the reference is intended to formalize DCAA's earlier informal query and our informal response regarding compensation paid to George Hage and Ben Plymale when they left the Company to fill Government positions at Government request.

Please supply the requested data to the undersigned by June 11, 1971. Some data may not be readily available in your files, such as the charge number requested in item 4 or the accounting distribution requested in item 7. These items should be identified as "N/A" in your response.

/s/ W. T. Armstrong
W. T. ARMSTRONG

Attachment

June 14, 1971
1-1806-2-160

To: W. T. Armstrong

Subject: 1967-1970 Severance Pay

Reference: 1) Memo 2-9450-0000-302 to A. H. Heiland from W. T. Armstrong dated June 8, 1971

2) DCAA Letter to D. M. Isham, CAR-7.10/2-105.213-1 dated June 3, 1971

I have researched our records and come up with the three cases that meet the requirements of reference (2) memo. They are as follows, item by item, as requested by Mr. Mahoney.

1. George H. Hage 533-14-4382 terminated July 4, 1967
2. Voyager Program Manager
3. $27,500 plus $7,500 bonus for 1966 performance
4. Organization 2-5000. Charge No. N/A
5. NASA—Washington, D. C.
6. $26,000
7. No "Other Compensation"
8. Rehired September 1, 1969, $37,000 as V.P. Product Development

1. Ben T. Plymale 540-26-2910 terminated April 26, 1968
2. Advanced Strategic Systems Manager—M&ISD
3. $32,500 plus $8,500 bonus for 1967 performance
4. Organization 2-1370. Charge No. N/A
5. D.O.D.—Washington, D.C.
6. $26,000
7. No "Other Compensation"
8. Not rehired to date

1. R. D. Fitzsimmons 539-14-2898 terminated May 8, 1970
2. Director Product Research—CAG
3. $31,000
4. Organization 6-7360. Charge No. N/A
5. Office of the President—Washington, D.C.
6. $7,500
7. No "Other Compensation"
8. Not rehired to date

Please let know if you need further information.

/s/ A. H. Heiland
A. H. HEILAND

LIMITED

BOEING EX. 14

THE BOEING COMPANY
Headquarters Offices—P.O. Box 3707—
Seattle, Washington 98124

October 1, 1971 1-9100-11-2688

To: Air Force Plant Representative
c/o The Boeing Company
Seattle, Washington 98124

Attention: Mr. Meyer Horowitz, Contracting Officer

Subject: Severance Pay Policy of The Boeing Company

During recent overhead negotiations the Contracting Officer inquired regarding certain severance pay matters. The Company would like to take this opportunity to describe our policy in this regard.

A number of years ago, The Boeing Company developed a plan to provide severance pay for employees whose termination came about under certain limited conditions. This plan has been consistently applied since its inception, although in total there have been comparatively few employees whose termination met the conditions for consideration under the plan. In light of the limited application intended under the plan, it has not been necessary to reduce all details of the plan to writing nor to print and distribute details in any of the various company media.

From time to time, highly valuable key career employees of the Company are sought out by various agencies or organizations and requested to accept an assignment of critical importance to the requestor. In some instances where such request includes an offer of "permanent" employment, the individual is free to accept or reject the offer based solely upon his personal evaluation of the

opportunity. In other instances the nature of the request is such that the employee and the Company may take advantage of the opportunity without the employee leaving the payroll. Examples of this type of assignment are opportunities to become part of a special research endeavor or study group where portions of the employee's income may be paid by the sponsoring (requesting) organization, either directly to the Company or to the employee, or assignments with quasi-public endeavors (IDA or the like) which have critical national importance to the Government and to industry, but are still a form of private enterprise where the assignment can be arranged without the employee terminating his employment.

The point of continuing Boeing employment for such an assignment versus being required to terminate is important to the individual. Typically, these are persons who have substantial investments in their Boeing career and would suffer considerable losses or penalties by terminating. In the many instances when the duration of the task is either fixed or generally determined to be a comparatively short period of time, such as two-three years, many of the "right" people for such assignments would be compelled to refuse to accept in light of the personal losses involved. In every instance the requiring agency or organization has seen to it that top company management has been acquainted of the need and the desire to fill that need with the Boeing man, the urgency of the request, the vital importance of the assignment to (often) national objectives or the vital technical knowledge that is such an important part of the base of our industry.

Top management initiates action to bring about the assigning of the men in question. All such proposals have had the personal review and concurrence of the Sr. Vice President and Secretary with the additional review and concurrence of other corporate officers such as the Vice President—Industrial and Public Relations, Group/Division General Managers and, in the case under discussion, the President and/or the Chairman of the Board. Detailed reviews and initial recommendations on severance pay are worked up by the Director of Management Compensation and then personally reviewed with the officers mentioned above, with final determination or concurrence from the Chief Executive.

It is Contractor's view that this severance pay plan meets the test of ASPR 15-205.39(a) (CWAS) (iii) and/or (iv).

THE BOEING COMPANY
Headquarters Offices

/s/ C. P. Koester
C. P. KOESTER
Assistant Controller

BOEING EX. 15

COMMERCIAL AIRPLANE GROUP

January 9, 1973
6-9502-3-006

To: Defense Contract Audit Agency
c/o The Boeing Commercial Airplane Company
Kent, Washington 98031

Attention: J. A. Mahoney
H. A. Kumasaka

cc: Air Force Plant Representative
c/o The Boeing Commercial Airplane Company
Seattle, Washington 98124

Attention: Meyer Horowitz

Subject: Review of CFY 1970 Overhead Claim

Reference: (a) DCAA Audit Report 7.10(60-125.2-305) dated December 19, 1972

(b) DCAA Audit Report 710-05-3-0065 dated August 18, 1972

(c) TM memorandum dated August 31, 1972; Subject: DCAA Report on Review of CFY 1970 Depreciation Expense 710-05-3-0065

(d) Memo 6-9502-3-306 dated October 26, 1972; G. A. Olson to DCAA; Subject: Severance Pay

(e) Memo 1-9100-11-2920 dated November 6, 1972; C. P. Koester to Meyer Horowitz; Subject: Review of 1970 Depreciation Expense

Reference (a) audit report has two audit exceptions, Contractor comments identified to audit report item numbers are as follows:

Item 3. a. relates to the contractor's Company-wide policy regarding the accounting for gains and losses on fully depreciated assets.

The Contractor does not concur to the audit exception for the same reasons stated in reference memo (e).

Item 3. b. states "The Contractor paid $7,500 severance pay to an executive employee who resigned to take a job with the Federal Government. Boeing does not have a written policy or procedure governing severance pay."

The Contractor does not concur with this audit except for the following reasons:

1. The employee was requested and made available to fill a position in the Executive Office of The President as Staff Leader of Aero-Research on The National Aeronautics Space Council.

2. The Company does not establish written procedures to accommodate exceptions of this type. Severance pay accorded top executives who are made available to the U.S. Government does not warrant a formal publication due to the infrequency of such activity. Each case, however, is individually judged on its own merit by a senior executive officer of the Company.

3. ASPR 15-205.39a does not state that the contractor is required to have written policy and procedures to cover all cases

involving severance pay. In addition ASPR 15-205-39 b. II states:

> "abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment"
>
> Note: Underlining added by Contractor

The only part of abnormal severance pay which is stated as unallowable in ASPR 15-205.39 b. II is accruals. In addition, it is stated "the Government recognized its obligation to participate to the extent of its fair share in any specific payment".

4. The DCAA reason for disallowing this item is supported by the quotation of part of ASPR 15-205.39(a). The audit report is quoted as follows:

> "ASPR 15-205-39(a) states that in each case, severance pay is allowable to the extent it is required by (i) law, (ii) its employer-employee agreement, (iii) established policy that constitutes, in effect, an implied agreement on the Contractor's part, and (iv) circumstances of the particular employment."

It is the Contractor's opinion that the DCAA has erred in its decision as it has misquoted ASPR 15-205.39(a) which is published as follows:

> "Costs of severance pay are allowable only to the extent that, in each case, it is required by (i) law, (ii) employer-employee agreement, (iii) established policy that constitutes, in effect, an implied agreement on the Contractor's part, or (iv) circumstances of the particular employment."
>
> Note: Underlining added by Contractor

It is the intention of the ASPR and our contracts that each of the quoted conditions stands alone when determining allowability. The misquotation of ASPR by DCAA by using an *and* between parts (iii) and (iv) makes all conditions a requirement of allowability. Such an interpretation is highly questionable since if severance pay were required by law (part (i)) the other conditions would be totally unnecessary.

In this particular situation, it is self-evident the requirements of parts (ii) and (iv) were satisfied. Again, ASPR 15-205.39 does not require a written agreement. The merit of the payment was approved by a Senior Vice President of The Company.

THE BOEING COMMERCIAL AIRPLANE COMPANY

/s/ Glenn A. Olson
for D. MCLAREN
Controller

BOEING EX. 16

BOEING

AEROSPACE GROUP
P.O. Box 3999, Seattle, Washington 98124

October 13, 1972

In Reply Refer to 2-9450-0000-515

To: Air Force Plant Representative
Contract Administration Division
The Boeing Company
Seattle, Washington 98124

Attention: Meyer Horowitz
Principal Contracting Officer

cc: Defense Contract Audit Agency
Resident Office, The Boeing Company
Seattle, Washington 98124

Attention: Mr. John A. Mahoney
Resident Auditor

Subject: 1969 Corporate and Aerospace Group Overhead Costs

References: (a) DCAA Audit Report 710-05-2-0325 dated February 16, 1972

(b) DCAA Supplemental Audit Report 710-05-2-0530 dated June 29, 1972

(c) Boeing Letter 1-9100-11-2715
C. P. Koester to DCAA dated November 22, 1971

Subject: "Memorandum of Audit Completion Administrative Expenses—Year 1969—Corporate Headquarters (Audit Report No. 710-05-2-0021)".

Following are comments and informal matter on the items of 1969 overhead costs which the DCAA has disapproved. Our comments summarize latest discussions and references to judicial and administrative rulings where applicable. To the extent that other correspondence already reflects the Company's position, those writings are referenced. Subject coverage is discussed in the order of appearance in the referenced audit reports.

DCAA QUESTION: Note 1 $1,002,708

"*Benefit Theory Taxes*: This is the remainder of the excess taxes allocated over taxes assessed to ASG after deducting from the excess the amounts questioned for (I) sale and use taxes on commercial tooling labor costs, and (II) property taxes on commercial inventories. (See Notes 19 and 20). The excess results from the use of Boeing's "benefit theory" of accounting for taxes. Under this theory, all taxes assessed to Seattle area divisions are pooled and then allocated to those divisions on a headcount basis."

CONTRACTORS REPLY:

Boeing letter 2-9240-0010-020 dated November 30, 1970, (attached) sets forth the Boeing position with regard to this item. We do not concur to the disallowance of these costs.

DCAA QUESTION: Note 2 $ 87,672

"*Relocation of ASG Computer Center*: In 1968 the contractor reassigned the ASG Computer Center, Building 2-35, to the Commercial Airplane Group (CAG), and relocated the ASG computer function at Kent. We believe that CAG is the prime benefactor of this move. In our audit of 1968 claimed overhead expense and at the request of the ACO, we disapproved all 1968 costs associated with this move. We now disapprove the 1969 costs associated with this move."

CONTRACTORS REPLY:

Letter 2-9240-0010-020 dated November 30, 1970, V. F. Knutzen to John A. Mahoney, Subject: "1968 Corporate and Aerospace Group Overhead Costs", (attached) addressed the question of the relocation of the ASG Computer Center. The test of logic is to consider that the computer facility was housed in a building owned by "X" and company "X" asked us to move out because they needed the room for their expanding operation. Our corporate guidelines on joint tenancy, contained in memo 1-9100-11-1800 dated January 31, 1966 (copy attached) are based on the premise that the tenant will pay for the cost of moving his plant equipment. It is our continuing position that the long-established accounting system provides for equity between pricing centers and that the proposed disallowance is inappropriate.

DCAA QUESTION: Note 3 $ 14,908

"*Relocation of Print Shop*: In 1967 the contractor released the Aerospace Group print shop to make space available for CAG programs. As requested by the ACO in his letter dated October 3, 1969, we disapproved all costs associated with this move in our audit of 1968 claimed overhead. We now disapprove the 1969 costs associated with the move."

CONTRACTORS REPLY:

Letter 2-9240-0010-020 dated November 30, 1970, V. F. Knutzen to John A. Mahoney, Subject: "1968 Corporate and Aerospace Group Overhead Costs", (attached) addressed the question of the relocation of the ASG Print Shop.

DCAA Question: Note 4 $138,032

"*Licensed Transportation Expenses*: The amount disapproved represents an over allocation of 1968 licensed

transportation costs to the Aerospace Group. We disapprove similar costs in our report on the 1969 ASG overhead claim. The contractor declined to change its licensed transportation accounting and will appeal to the ACO."

CONTRACTORS REPLY:

Substantial efforts have been made by Boeing to communicate our belief that these costs have been appropriately allocated and that they are allowable. The following correspondence from The Boeing Company elaborate the reasons why it is our belief that these costs have been appropriately allocated. The contractor does not concur in this disallowance.

Boeing letter 1-9100-11-2859, dated July 21, 1972*
Boeing letter 1-9100-11-2822, dated May 17, 1972*
Boeing letter 1-9100-11-2753, dated January 14, 1972*
Boeing letter 1-9100-11-2563, dated October 30, 1970*

*Letters attached

DCAA QUESTION: Note 5 $ 676

"*Accounting Fees*: The disapproved costs represent accounting fees incurred in connection with the contractor's two-thirds interest in Alinavi. These costs have been historically appealed to the ACO."

CONTRACTORS REPLY:

Our position relative to the allowability of the accounting fees relative to the Boeing two-thirds interest in Alinavi was set forth in letter 1-9100-11-1773 dated December 21, 1965, C. P. Koester to AFPR (CMRSK), Subject: "Accounting for Company effort related to organizations and activities in which The Boeing Company has a Financial Interest."

DCAA QUESTION: Note 6 $101,624

"*Remote Pool Credit*: When the contractor closed its books for CFY 1969, a Remote Pool credit balance of $101,624 was closed out to the Area Administrative Pool. However, the contractor failed to show the same credit adjustment in its 1969 ASG Overhead Claim. This effectively overstated the inplant area administrative expenses for the year. The contractor has orally concurred with our disapproval of this amount and will adjust its claim accordingly."

CONTRACTORS REPLY:

The contractor agrees that the overhead claim was prepared in error and concurs with the audit finding which is in agreement with the contractors books of account. This item will be handled with all other 1969 cost questioned items without formal adjustments of the claim.

DCAA QUESTION: Note 7 $162,683

"*Adjustment for Statutory Unallowables*: The contractor erroneously included in its 1969 ASG Overhead Claim a $162,683 adjustment to its inplant administrative expense pool for certain "Statutory Unallowables" which had been initially allocated out to BATC, LVB, Houston and Washington, D.C., in the group administrative pool allocation. The contractor has orally concurred with this disallowance."

CONTRACTORS REPLY:

The contractor agrees that the overhead claim was prepared in error and concurs with the audit finding which is in agreement with the contractors books of account.

DCAA QUESTION: Note 8 $ 38,301

"*Consulting Fees*: We consider consulting fee expenses to be in direct support of the AWACS, ASMS, and

SRAM programs. We have accordingly disapproved these costs as overhead and recommend reclassification of these items as direct costs."

CONTRACTORS REPLY:

Contractor disagrees that the consulting fees should have been charged direct to the three Government contracts. The effort consisted of advising management with respect to improving techniques of program management. These consultants were not involved in performance of any element of the contract work statement. The contractor's records show the current value as $38,281 rather than the $38,301 shown in the audit report.

DCAA QUESTION: Note 9 $8,611

"AWACS Illustrators: Illustrators for art/chart work for the AWACS control room which was charged to ASG overhead expense. The expense should have been charged directly to Definition Phase contract F19268-69-C-0194."

CONTRACTORS REPLY:

The contractor disagrees with the DCAA position in that it is contrary to establish charging practices and would violate the ASPR provision contained in paragraph 15-202 (a) which is partially quoted as follows ". . . when items ordinarily chargeable as indirect costs are charged to Government work as direct costs, the cost of like items applicable to other work of the contractor must be eliminated from indirect costs allocated to Government work." The subject purchased services were procured by the Audio-Visual organization 2-2725 to relieve a temporary overload. These types of costs in 1969 were classified as indirect.

DCAA QUESTION: Note 10 $ 13,467

"*Business Meeting Expense—Advertising*: The costs disapproved are for exhibits and displays in conjunction

with various conventions and banquets. Similar costs in prior years are included in ASBCA Case No. 14370."

CONTRACTORS REPLY:

The contractor agrees to treat these costs in accordance with the final disposition of ASBCA 14370.

DCAA QUESTION: Note 11 $ 6,295

"*Customer Service Expense*: We consider the cost of ashtray desk sets, containing a model of the AWACS airplane and related decals and special packing boxes to be advertising."

CONTRACTORS REPLY:

The contractor considers the cost of these items to be an allowable expense. As noted in paragraph 9 of attachment A to letter 1-9100-11-2351 dated November 22, 1968, V. F. Knutzen to AFPR (CMRSK) certain indirect costs are allowable, "Selling costs (selling costs arise under the marketing of the contractors products and include costs of sales promotion, negotiation, liaison between Government representatives and contractor's personnel, and other related activities)." These costs will be treated in accordance with final disposition of ASBCA 14370.

DCAA QUESTION: Note 12 $ 8,474

"*UGN Loaned Executives:* The amount disapproved consists of salaries and related costs of Boeing executives while on loan to the United States Good Neighbor Fund campaign. The contractor has appealed this cost disapproval to the ACO in prior years."

CONTRACTORS REPLY:

Letter 1-9100-11-2447 dated September 25, 1969, (attached) "Contractor considers its part in the UGN Loaned Executive program to be a necessary and required

activity as a good member of the community. Such activity is not considered as a contribution to a charity as contemplated by ASPR 15-205.8. Contractor contends such costs are reasonable and necessary expenses which should be considered by the Government as an allowable cost."

DCAA QUESTION: Note 13 $347,432

"*Excess Depreciation:* The $347,432 disapproval represents the depreciation charged in excess of that allowed by the IRS for the addition made to the 18-24 Building in 1967. The contractor concurs with the disallowance and has adjusted its records accordingly."

CONTRACTORS REPLY:

The IRS has determined that additions in 1967 to the 18-24 Building must be depreciated over 25 and 40 year periods instead of the 8-year life used to record depreciation in 1969. The 1969 overhead reduction of $347,432 is concurred to by the contractor.

DCAA QUESTION: Note 14 $ 4,627

"*Convention and Business Meeting Expense in the Nature of Entertainment:* Most of the amount disapproved was for the cost of meals and beverages for Boeing employees and their guests while attending meetings and conventions of non-profit associations such as Navy League, American Fighter Pilots Association, etc. The other amount disapproved was the cost of cocktail parties for guests of the Company."

CONTRACTORS REPLY:

Contractor concurs that $99 should have been charged to account 841, Entertainment Expense. Contractor does not concur to any of the remaining dollars being disallowed. These costs will be treated in accordance with ASBCA No. 14370 disposition.

DCAA QUESTION: Note 15 $ 27,361

"*Employee Housing Plan Costs:* The amount disallowed represents the costs charged to the Aerospace Group for losses on the sale of employee homes and mortgage interest payments. Similar disapproved costs for CFY 68 were appealed to the ACO."

CONTRACTORS REPLY:

To the extent that $6,019 of the questioned amount represents an excess of 8% of the sales price, and the Employee Housing Plan is uniformly applied throughout the Company in accordance with ASPR 15-201.3(b)(6), there is a flow down of the corporate CWAS to the Aerospace Group. The $6,019 is therefore an allowable cost under ASPR 15-205.25.

Contractor does not concur to disallowance of the remaining $21,342. Our position, described in letter 1-9100-11-2640 (copy attached) is that these costs should be allowable since they are primarily caused by Government contract requirements which require relocation of personnel.

DCAA QUESTION: Note 16 $ 2,690

"Legal Fees: Amounts disapproved were payments to outside attorneys in connection with appeals to the ASBCA. The contractor has included similar legal expense for prior years in its appeal to the ASBCA, Case No. 14370. In a number of earlier appeals by other contractors the ASBCA has ruled that such legal fees are unallowable."

CONTRACTORS REPLY:

Contractor does not concur to the disallowance of these costs.

DCAA QUESTION: Note 17 $ 2,874

"*New-Hire Relocation*: These costs were incurred to relocate newly hired employees who voluntarily terminated employment prior to completing one year of employment. The contractor has appealed our disapproval of CFY 1968 new-hire relocation costs to the ACO."

CONTRACTORS REPLY:

The issue here is recruitment expense relative to relocation of new hires who resigned for reasons within their control within the 12-month limitation set by ASPR 15-205.33 (d). The Company disagrees with this disallowance as explained in conjunction with Turbine Division counterpart actions.

DCAA QUESTION: Note 18 $ 22,000

"*Severance Pay:* These are payments made to Boeing executives who voluntarily resigned even though the contractor has no policy or procedure which provides for payment of severance pay."

CONTRACTORS REPLY:

The auditor's position is based on the two points that two Aerospace Group executives voluntarily resigned and that the Company has no policy or procedure which provides for severance pay.

The two executives were requested by and made available to the Government in 1967 and 1968. One filled a NASA position as Deputy Associate for Engineering in the Office of Space, Science and Application. The other filled a DOD position as Assistant Director, Strategic Systems, ODDR&E.

The Company does not establish written procedures to accommodate exceptions of this type. Severance pay accorded top executives who are made available to the U.S.

Government does not warrant a formal publication due to the infrequency of such activity. Each case, however, is individually judged on its own merit by the Chief Executive Officer of the Company. The amount of severance pay was determined on the basis of the executive's contribution to Boeing and recommendations arising from discussion with Government officials and Government lawyers.

Compensation in the form of severance pay for Mr. Hage and Mr. Plymale, in Company judgment, corresponds to the abnormal severance pay referred to in ASPR XV-205.39(b)(ii) . . . "However, the Government recognizes its obligation to participate to the extent of its fair share, in any specific payment." There is no question that these costs were incurred for the benefit of the Government and therefore are allowable.

DCAA QUESTION: Note 19 $179,729

"*Sales and Use Taxes:* The Washington State Use Tax Measure, which became effective June 1, 1965, exempted DOD contractors from a tax on tooling labor costs that had put them at a competitive disadvantage with DOD contractors located in states where no such tax is levied. No such exemption is accorded tooling used in commercial work. The amount disapproved represents sales and use taxes applicable to commercial tooling labor cost. ASPR 15-205.41 (a)(v) states that "taxes on any category of property which is used solely in connection with work other than on Government contracts are not allowable."

CONTRACTORS REPLY:

This item was approved for reinstatement by the ACO in the spring of 1972.

DCAA QUESTION: Note 20 $2,565,946

"*Personal Property Taxes*: These are personal property taxes applicable to Boeing's work-in-process, tooling and

spares inventories used in the commercial activities. ASPR 15-205.41 (a)(v), a promulgated on September 30, 1962, states that taxes on contractor-owned work-in-process inventories which are used solely in connection with non-Government work should be allocated to such work. The ASBCA ruled in Case No. 11866 that taxes on commercial inventories after the effective date of ASPR revision are unallowable on Government contracts. Boeing is appealing this decision to the U.S. Court of Claims."

CONTRACTORS REPLY:

Contractor does not concur to the disallowance of these costs. Reasons for the contractors belief that these costs are allowable are cited in the brief appealing ASBCA No. 11866 to the U.S. Court of Claims.

DCAA QUESTION: Note 21 $ 338,011

"*Corporate Expense Allocation*: ASG share of Corporate expenses disallowed."

CONTRACTORS REPLY:

The questioned amounts are discussed by separate letter from the Headquarters Finance Organization, 1-9100-11-2715 dated November 22, 1971, (reference c).

DCAA QUESTION: Note 22 $ 910,638

"*Retirement Expense*: This item represents the contractor's claimed CFY 1969 offset to IRS disallowances of supplemental future service benefits retirement costs for the years 1967 and 1968. The contractor's rationale for claiming this as a 1969 period cost is its opinion that the IRS will allow the item as an expense for the year 1969. The IRS disallowance was based on a determination that the supplemental future service benefits were overfunded."

CONTRACTORS REPLY:

As we have recently advised, IRS formal approval is momentarily expected. Copies thereof will be provided as the basis for cost resubmission.

DCAA QUESTION: Note 23 $1,808,676

"*Excess Bid and Proposal Costs:* We have reclassified $5,820,770 from bid and proposal (B&P) expense to the ASMS contract definition contract N00017-69-C-2401 (N-2401). In our opinion these costs were for work that was within the scope of that contract, and we therefore disapprove the costs in accordance with ASPR 15-202(a). Application of the Tri-Services advance agreement cost ceiling criteria to the reclassified amount results in the disapproval of claimed B&P costs of $761,215. The overhead burdening adjustments totaling $1,047,461, to the several prime expense pools adjust those pools for the overhead burden redistribution resulting from the reclassification of this effort from B&P expense to direct contract work."

CONTRACTORS REPLY:

The audit position that costs charged to B&P should have been charged to the CD Contract is an opinion with which the contractor does not agree. The contractor's accounting procedures and systems have been strictly followed and charges to Contract and Bid Proposal activities were carefully monitored based on a discrete definition of the efforts to be performed. The contractor's position is contained in letter 2-9240-0010-014 dated November 3, 1970 (attached and has been further discussed and defined in numerous meetings with Government personnel. The Company presumes that all Government requests for information have been fulfilled. Approval as overhead is expected.

The Contractor is separately proposing an offer to resolve all open cost questions.

THE BOEING COMPANY
Aerospace Group

/s/ Einar Larson
EINAR LARSON
Director of Finance

Attachments as
identified above.

BOEING EX. 17

BOEING

AEROSPACE GROUP
P.O. Box 3999
Seattle, Washington 98124

In Reply Refer to 2-9450-0000-020
April 6, 1973

To: Air Force Plant Representative
Contract Administration Division
The Boeing Company
Seattle, Washington 98124

Attention: Klemmet Anderson
Principal Contracting Officer

cc: Defense Contract Audit Agency
Resident Office, The Boeing Company
Seattle, Washington 98124

Attention: Mr. John A. Mahoney
Resident Auditor

Subject: 1970 Boeing Aerospace Company Overhead Costs

Reference: (a) DCAA Audit Report 710-05-3-0166 dated January 15, 1973

Following are comments and informational matter on the items of 1970 overhead costs which the DCAA has disapproved. Our comments summarize latest discussions and references to judicial and administrative rulings where applicable. To the extent that other correspondence already reflects the Company's position, those writings are referenced. Subject coverage is discussed in the order of appearance in the referenced audit reports.

• • • •

Account No.	Reference No.	Amount
401	12-064425	$1,859
401	4-060324	2,404
401	7-060224	1,742
		$6,005

CONTRACTORS REPLY:

The contractor considers the cost of these items to be an allowable expense. As noted in paragraph 9 of attachment A, to letter 1-9100-11-2351 dated November 22, 1968, V. F. Knutzen to AFPR (CMRSK) certain indirect costs are allowable, "selling costs (selling costs arise under marketing of the contractors products and include costs of sales, promotion, negotiation, liaison between Government representatives and contractor's personnel, and other related activities)." These costs will be treated in accordance with final disposition of ASBCA 14370.

DCAA QUESTION: Note 12 $204,144

Unpaid incentive compensation: The amounts disapproved are costs that were accrued and claimed in anticipation of the award of executive bonuses by Boeing's Board of Directors. The Board did not award the bonuses and the accruals were cancelled by reversing entries in 1971 and 1972.

CONTRACTORS REPLY:

The contractor concurs.

DCAA QUESTION: Note 13 $ 6,048

Payments to Former Executives: The payments were made to former Boeing executives while they were working for U.S. Government. Contractor support data indicated the payments were for severance pay that was

intended to cover a portion of what the executive would lose by taking a Government job. The support data stated the payments were not intended to be deferred compensation.

We have disapproved these payments because they do not meet the criteria in ASPR 15-205.39 for severance pay and because the contractor has nct claimed that they were payments for compensation for personal services, ASPR 15-205.6. ASPR 15-205.39 says" . . . Severance pay, also commonly referred to as dismissal wages, is a payment . . . to workers whose employment is being terminated. . . ." Since the employees were not dismissed, ASPR 15-205.39 would not be applicable. To be allowable under ASPR 15-205.6 the payment would have to be ". . . for services rendered by employees to the contractor during the period of contract performance. . . ." The contractor rules out the possibility that the payments were deferred compensation for services rendered before they accepted Government employment and it did not claim that the payments were for current services rendered while in the Government's employ.

CONTRACTORS REPLY:

The auditor's position is based on the two points that payment was made to an Aerospace Group executive and that The Boeing Company has no policy or procedure which provides for severance pay.

This executive was requested by and made available to the Government in 1968 and 1969. He filled a DOD position as Assistant Director, Stragic Systems, ODDR&E.

The Boeing Company does not establish written procedures to accommodate payments accorded top executives who are made available to the U.S. Government and who terminate their employment with the Company, due to the infrequency of such activity. To date, only two Aerospace and one Commercial Airplane Group executive have

received such payments. Each case is individually judged on its own merit by the Chief Executive Officer of the Company. The amount of payment was determined on the basis of the executive's contribution to Boeing and recommendations arising from discussion with Government officials and Government lawyers. The contractor does not concur with this disallowance.

DCAA QUESTION: Note 14 $ 8,186

UGN loaned executives: The amount disapproved consists of salaries and related costs of Boeing executives while on loan to the United Good Neighbor Fund campaign.

CONTRACTORS REPLY:

Boeing undated letter *2-9450-0000-519, Einar Larson to AFPR, sets forth the contractors position relative to the allowability of this item. Further explanations are contained in letters *1-9100-11-2351 dated November 22, 1968 and *1-9100-11-2447 dated September 25, 1969. The contractor does not concur to the disallowance of this cost. *Copies attached.

DEF. EX. 37

[SEAL]

OFFICE OF THE UNDER SECRETARY
OF DEFENSE
Washington, D.C. 20101

16 September 1982

Research and
Engineering

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR RESEARCH & ENGINEERING

PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING
PRINCIPAL MILITARY ASSISTANT TO THE DEPUTY UNDER SECRETARY OF DEFENSE (STRATEGIC & THEATER NUCLEAR FORCES)

SUBJECT: Disqualification

I have disqualified myself from involvement in any particular matter which might have an impact upon the Boeing Aerospace Company. In the event that such a matter arises, it should be brought to the attention of Brig Gen D. A. Vogt, USAF, Principal Military Assistant to the Deputy Under Secretary of Defense (Strategic & Theater Nuclear Forces).

/s/ T. K. Jones
T. K. JONES
Deputy Under Secretary
Strategic & Theater Nuclear Forces

cc: AGC (LC), Ms Buck
Director, Personnel
& Security, WHS

DEF. EX. 88

[SEAL]

THE ASSISTANT SECRETARY OF THE NAVY
(Research, Engineering and Systems)
Washington, D.C. 20350

16 September 1982

MEMORANDUM FOR GERALD CANN, PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE NAVY (RESEARCH, ENGINEERING & SYSTEMS)

Subj: Boeing Company Matters

Effective immediately, I am disqualifying myself until further notice from participating in any particular matter involving the Boeing Company, and any subsidiary or affiliate thereof, including but not limited to the following projects:

(a) The JVX,

(b) Stand-off ASW,

(c) ECX.

Matters such as the above should not be presented to me but should be referred to you for decision, approval, disapproval, recommendation, advice, investigation, or other official action. In the event such a matter does arise which requires the attention or participation of the Assistant Secretary of the Navy (Research, Engineering and Systems), it should be referred to the Under Secretary of the Navy or as he shall otherwise direct.

/s/ Melvyn R. Paisley
MELVYN R. PAISLEY

Copy to:

Secretary of the Navy
Under Secretary of the Navy
Under Secretary of Defense (Research & Engineering)
General Counsel, Department of Defense
Executive Assistant to the Deputy Secretary of Defense

DEF. EX. 145

[SEAL]

DEPARTMENT OF THE NAVY
Office of the Assistant Secretary
(Research, Engineering and Systems)
Washington, D.C. 20350

27 September 1982

MEMORANDUM FOR THE OFFICE OF THE ASSISTANT SECRETARY OF THE NAVY (RESEARCH, ENGINEERING AND SYSTEMS) STAFF

Subj: Disqualification to Act in Certain Matters

I am disqualified from participating in any particular matter involving the Boeing Company and General Electric Company, or involving any subsidiary or affiliate thereof, unless and until I notify you otherwise.

No matter as to which I am disqualified as aforesaid should be presented to me for decision, approval or disapproval, recommendation, advice, investigation, or other official action. In the event that any such matter does arise requiring the attention or participation of the Deputy Assistant Secretary of the Navy (Command, Control, Communications and Intelligence), it should be referred to the Principal Deputy Assistant Secretary of the Navy (Research, Engineering and Systems) or as he shall otherwise direct.

/s/ Harold Kitson
HAROLD KITSON
Deputy Assistant Secretary
of the Navy (Command,
Control, Communications &
Intelligence)

Copy to:
PDASN(R,E&S)

DEF. EX. 153

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

(Title Omitted in Printing)

DEPOSITION OF JANET E. THOMPSON

Washington, D.C.
November 13, 1986

• • • •

[27] Q Okay. You mentioned recruitment letters. Can you describe who would send such a letter?

A Normally the organization that has the position will send out a letter to organizations that would be able to identify qualified applicants, and normally the letter would be signed by either the immediate supervisor or a higher level individual in that organization.

Q Are these form letters?

A No, they are not form letters.

Q I see. Are they drafted for specific positions?

A Yes.

Q Or to fill specific positions?

A Yes.

Q Now, if an individual is recruited in one of these ways, either by receiving a letter through the announcement for competitive service vacancy or recruitment at professional meetings, is it common for prospective candidates to discuss possible employment with their prospective superiors?

A Would you repeat that question?

(The pending question was read by the reporter.)

THE WITNESS: I don't know if that is a common [28] practice.

BY MR. KARRON:

Q Are you aware of it ever occurring?

A Yes.

Q Okay. In cases in which individuals receive recruitment letters from prospective superiors, are you aware of instances in which they met with such prospective superiors to discuss possible employment?

A The letters are normally written to organizations to achieve executive officer or some high level official asking for their assistance in identifying qualified applicants as opposed to writing directly to prospective employers asking them to apply for the jobs.

Q But if an individual is notified by his or her organization that such a letter has been sent and responds, or is put forward by his or her organization, are you aware of instances in which such individuals have met with prospective superiors to discuss possible employment?

A I know of examples where individuals have asked for information and have discussed with the organization, the parameters of the job, what the job entailed, who they would be reporting to. It is at the time an individual has [29] been referred to a selecting official as one of the best qualified applicants that they are formally discussing possible job opportunities and possible employment.

Initial stages are more fact finding. They feel that they can get more in-depth information from the organization, as opposed to reading a simple vacancy announcement.

Q But is there anything that precludes such individuals from talking with prospecitve superiors to find out what the job might entail, what their salary might be, to whom they would report, or other aspects of the position?

A There is nothing that would preclude that.

Q And indeed are you aware of whether that ever happens with respect to SES or Schedule C positions or positions requiring Senate confirmation?

A I have never participated in any of those meetings, but I understand from applicants advising me that they have talked to an organization, an organization's administrative officer sharing that they had been contacted by various applicants that this is something that happens.

Q Okay. Now, in such a circumstance, the individual that they talk to does not have the authority, does he, unilaterally to appoint that candidate to a position?

[30] A No.

Q So that would be true, just to go through each of these, for the position of Deputy Under Secretary of Defense for Strategic and Nuclear Theater Forces?

A That would be true, yes.

Q And for the position of Assistant Secretary of the Navy.

A That is true.

Q And for the position of Deputy Director of Space and Intelligence Policy in the Office of the Deputy Secretary of Defense?

A True.

Q And for the position of Deputy Assistant Secretary of the Navy for Command, Control Communications and Intelligence?

A True.

Q Okay. So that any such candidate must go through several different sorts of personnel review and approval procedures before actually being appointed to such a position?

A That is correct.

Q Okay. Is there a term of art or name that is used by your office for candidates for such positions? Someone [31] who has applied for such position?

A Call him an "applicant."

Q Call him an "applicant"? I will try to refer to them as such.

Now, I believe that you have testified before, correct me—

MR. LACOVARA: Excuse me. When do they cease being called "applicants"?

THE WITNESS: When they are appointed to the job.

This term is primarily used when we are talking about career appointments in the Senior Executive Service. We are not normally involved in recruitment of noncompetitive selections, which are your noncareer appointees. So we normally will not have applicants in our organization. Applicants are normally people who are applying for a competitive announcement that I have described to you earlier and would be given ultimately a career appointment in the SES.

BY MR. KARRON:

Q I see. Who would be involved in processing applicants, for want of a better word, for noncareer appointments in the SES or in other positions?

A For the noncareer, it is a multi-phased process. [32] There are numerous people that are involved, including our organization in terms of making recommendations on whether or not the individual meets the technical and managerial qualifications of the position to merit appointment in the SES.

Q Okay.

A As well as other positions.

Q Okay. I would like to go through that process. What would your office do in that process?

A In the noncareer?

Q In the noncareer.

A The organization that has the position—for example, the Office of the Under Secretary of Defense for Research and Engineering, which at that time was employer for Mr. Jones—would send us a written request

asking for approval for the noncareer appointment of said individual outlining the requirements of the position with a formal position description attached, either to establish the position or saying the position is already established, and they want to fill a vacant job, and asking for approval for the appointment.

• • • •

[49] A I have an understanding that individuals may be identified in a variety of different ways. It is certainly not the formalized structured process that we go through for career appointees.

If you are looking for an individual to go into the health affairs arena, individuals in that organization have a community of individuals that they work with and are aware of people that have the expertise that they are seeking to fill a job, and will seek the services of that individual for employment with the United States Government. And those groups of people that they would go after would obviously be very different from individuals when we are talking about a research and engineering job

That is the same for both career and noncareer appointees, you work with the groups of organizations that can offer you qualified people for your job.

Q Nonprofit as well as profit organizations might be sources of information or candidates?

A Yes. I have an understanding that the prospective noncareer appointee could be identified either by the management organization, or might be proposed perhaps by the Assistant to the Secretary of Defense, DEP SEC, for [50] consideration, and that organization would work with the OSD component.

Q Do you know whether candidates are ever proposed from outside the department heads for one of these positions?

A No, I do not know, and I could not wager a guess on that.

BY MR. KARRON:

Q I would like to return to what I would like to call the political review, that is in the case of Presidential appointments.

I believe you testified that those people's names are sent to the Senate first for confirmation and then your office undertakes the qualifications review?

A No, sir. There is no qualifications review done by our office for Presidential appointees requiring Senate confirmation. That process is done in conjunction with the White House and the Senate to confirm the individual.

Q And who would do that review then?

A For the Department of Defense, the only official that I know would be involved in that process would be the Assistant to the Secretary and Deputy Secretary of Defense, and possibly the most senior level official in the organization, [51] the Undersecretary or Assistant Secretary in conjunction with the Secretary of Defense deciding who they would like to have join the Secretary's immediate staff.

Q I see. But do they undertake a qualifications review in terms of experience or managerial or technical skills similar to that undertaken by your organization?

A I am sure that when they identify an individual for a position, they want to have somebody that is qualified to do their job technically, and somebody who will be a good manager and have been managing very large organizations, large groups of people, dollar amounts, et cetera.

There is no prescribed qualifications requirement for Presidential appointees as there is for the SES or for Schedule C appointments where there is a very definite requirement that must be met.

Q So for noncareer SES and Schedule C appointees, your office would do the qualifications screening, is that correct?

A We would ensure that the qualification requirements have been met. That is not to say that there are

other officials that are also concerned about the same issues.

Q And who would those people be?

[52] A The organization that wants to hire the individual would want to ensure that they are qualified for the job, as well as the DSEC Secretary and Deputy Secretary of Defense.

Q And would the hiring organization conduct its qualifications review before or after your office conducts its review?

A Before. They would not ask us to appoint an individual if they did not feel they were qualified for the job. It is done before they request our review.

Q Okay. So to try to get the sequence straight, they would conduct the agency in-house qualifications review, is that correct?

A I wouldn't call it the agency review. I would just call it the organization's review that would have the individual.

Q Okay.

A We are conducting the review on behalf of the Secretary of Defense.

Q Okay. But after the organization review is completed then the applicant, his applicant's application is referred to your office; is that correct?

A Ultimately it is referred to our office.

[53] It may be referred simultaneously to our office as it is being referred to the Assistant to the Secretary of Defense, the Deputy Secretary for the White House approval process that is accomplished by that particular organization. So it may come to both places simultaneously, or it may come to us after the White House approval process has been completed.

Q Okay.

A But the White House approval process is not specifically addressing qualifications for an SES appointment. Perhaps an individual is cleared politically and the appointment is ultimately made as a Schedule C versus

an SES noncareer. There may be some deficiencies, some shortcomings perhaps in managerial expertise that the individual has to offer, and they may bring the individual in at a lower level echelon.

Q Okay. So do I understand correctly, then, that in some cases political approval, if we can call it that, saw it first, or before the application is sent to your office?

A Yes.

Q And do you have any knowledge as to how long that process takes?

[54] A I do not know how quickly that can take place. I do know that in some cases it has taken months and in some cases the clearance has never been issued.

BY MR. LACOVARA:

Q Do you know the reasons why the clearance is not issued?

A No, sir.

Q Have you ever heard any reasons why clearances have not been issued for people whose qualifications have been approved?

A Simply that the White House clearance was not issued. They don't elaborate.

Q What is the route of communication between the Department of Defense and the White House requesting political appointees?

A Through the Assistant and Deputy Assistant Secretary of Defense.

Q Is any paper work on that sent to your office?

A We receive a notification that the White House clearance has been issued, and that document is maintained in the files that we keep on the individual.

We do not receive that on each and every case.

• • • •

[57] Q Do you know what that percentage is?

A I am sorry, I do not.

Q Any approximation?

A I believe it is about 10 percent of the total SES, approximately.

Q That may be filled through the noncompetitive route?

A Noncareer.

Q Noncareer?

A Yes, sir.

Q But you said that in your experience, OPM has never disapproved a request for permission to appoint?

A Not—

Q To a noncareer position?

A Not that I know of. And, of course, the Department of Defense is just one of many federal agencies. I have no idea what other cases from other federal agencies may have.

Q Would you know of any instances in which OPM refused to accept a recommendation for permission to appoint to a noncareer position in the Defense Department?

A No, I know of no such cases.

Q No, would you know of such if there were such?

A Yes.

[58] Q Your knowledge about contacts between the Department of Defense and OPM is sufficiently broad that if there had been a recommendation to disapprove, you would know about it?

A Since 1984.

Q Thank you. Let me see if I can summarize what I think you have described the process as being.

Once a person that you describe as a management official decides that he wants to have a certain person, candidate, work for that official in one of these noncareer positions, I believe that that would assume, that would include the four positions of the defendants in this case other than Mr. Paisley is that correct?

A I am not familiar with Mr. Kitson.

Q Mr. Kitson, if you will accept my representation, he was Deputy Assistant Secretary of the Navy for Communications, Command, Control and Intelligence.

A I would liek to say one thing, there are two types of SES positions that exist, career reserve position that can only be filled by career appointees, and general position that are advocates of Administration policies and do not require career appointment. It can be filled either by career appointees or noncareer appointees.

[59] That Deputy Assistant Secretary of the Navy job is a general job. Whether or not it was filled by a career appointee or a noncareer appointee at that time I do not know.

Q Would the notice of personnel action form, for example show whether a person was appointed to a career or noncareer position?

A Yes.

Q So if we had those documents, we would be able to tell which way the job was being treated for a person appointed to the position that Mr. Kitson held, is that correct?

A Yes, you would know how the job was determined, how it was categorized, as well as the type of appointment that was given to the individual.

Q All right.

A The job was designated the same regardless of the employee. That remains constant.

Q The title remains the same?

A And the categorization, whether career reserve job or general job, it remains the same.

Q I am not sure I understand that distinction, but I am not sure I need to.

Let me ask the question that I was about to begin [60] and see if I summarize correctly the process for appointing noncareer officials in the Department of Defense, and we will establish later which of the defendants in this case fits in this category.

Is it correct, according to your testimony, that a management level official decides he would like to have a par-

ticular candidate work for him, he then asks your office to approve that appointment and your office reviews the technical qualifications including the qualifications as shown on SF-171.

In the first instance, a Personnel Management Specialist at your level reviews that package of files, makes a recommendation to the Director of the Personnel and Security Directorate, who then makes a determination and submits a recommendation to the Deputy Assistant Secretary of Defense for Admission, who then makes a determination and submits a recommendation about the qualifications of that candidate to the Assistant to the Secretary of Defense and Deputy Secretary of Defense.

Is that correct so far?

A The chain is correct. All those decisions are made on the one document. The document that is prepared at my level is the recommendation, if agreed upon, is signed by the [61] Director of Personnel and Security, and it flows through each of those management officials that you have addressed, but they are not separate decision papers that are developed at each of those stages.

Q Are there separate decisions, or is it simply automatic, that the papers are automatically approved all the way up the line once a personnel management specialist at your level says he or she is satisfied?

A They are not automatic decisions.

Q So each person is making a determination up the chain of command, although the basic document for approval or disapproval will be the recommendation for the analysis of a person at your level; is that correct?

A Yes, sir.

Q All right. So we have gotten to the Assistant to the Secretary of Defense and the Deputy Secretary of Defense. Perhaps simultaneously or perhaps subsequently, there is a security investigation being done; is that correct?

A Yes, sir.

Q And what happens with that security investigation's results?

A When the individual has been cleared for the level [62] of clearance that is needed for the job, my organization is informed, we are given a notification that the individual is eligible for appointment to the stated position, and we then have a green light, and that clearance process that we can move forward.

Q Does that happen before you send your technical qualifications recommendation up the chain of command, or does it happen afterwards?

A It could go either way.

Q Either way.

A Yes, sir.

Q And you would then forward that recommendation about the security clearance of the candidate up to the Assistant Secretary of Defense?

A No, sir.

Q I'm sorry, where does that recommendation go?

A It comes to my organization, the SES in Classification Division.

Marybel Batjer, who is the Assistant to the Secretary of Defense, would certainly be eligible to know if that had been done. I have never been contacted by her office specifically to inquire as to the status of security.

[63] The Personnel and Security Directorate does prepare a weekly report for her on the status of pending noncareer appointments, which includes the status of the security clearance—yes it has been done, or no it has not been completed yet. So she does have information that is fed to her in that regard, but not the specific form that is sent to me. It is not forwarded.

Q How many different offices are involved in doing security clearance for the Department of Defense civilian employees?

A Several that I am aware of.

Again, this is a process that—it is a complete separate processing unto itself. Our Personnel and Security Office

works together with the Defense Investigation Service, with the Defense Intelligence Agency, and I understand for Presidential appointees, that the Federal Bureau of Investigation is involved in the clearance processes there.

Q I believe you testified earlier when you receive a recommendation from a management official, you are the person that requests the appropriate security investigation; is that correct?

A What it is called is notification of incoming [64] personnel.

I notify the Security Office that an individual has been recommended for appointment to a position. I advise them that it is a noncareer appointment and that the appointment is pending approval of qualifications, White House approval, et cetera.

Q The Security Office is an office that is part of the Personnel and Security Directorate?

A Yes, sir.

Q And they determine which investigative arms will actually do the security clearance, is that correct?

A Yes, sir, they know which arms are responsible for what types of clearances.

Q Types meaning—?

A Levels of clearance.

Q Different organizations do different levels of clearances?

A As I understand it, yes, sir.

Q Do you know whether different organizations do different security investigations for appointments to different divisions of the Department of Defense?

For example, say, does the Office of Naval [65] Intelligence do security investigations for proposed appointees to the Department of the Navy?

A I do not know what their role is in doing investigations, no, sir.

Q Do you know whether more than one security service may be involved in doing security investigations?

A Yes, sir, they are.

Q For a particular appointee?

A Correct.

Q More than one security agency may have to investigate the background of a particular candidate before the security clearances will be approved?

A My understanding is that the Defense investigators are the investigating arm. If you are talking about an individual at this level position, we would normally have someone who would require at least a top secret clearance, which requires a background investigation. That investigation is conducted by Defense Investigative Service, but, now, they investigate but do not adjudicate whether or not the person should be granted the clearance. That is done by the Defense Intelligence Agency from my understanding.

Q For compartmentalized clearances, who does the [66] investigations?

A From my personal information, I understand that it's the Defense Investigative Service for noncareer SES members.

Q You mentioned that the FBI may have a role in this security clearance process. Do you know what that role is?

A I am only aware from discussions of prospective Presidential appointees requiring Senate confirmation, that the FBI is involved in their clearance.

I do not know to what extent, or what their role is.

Q You don't know whether that is a security clearance or general background investigation?

A The security clearance would ultimately be granted by the Security Office in our organization, based on investigations by the investigations groups, normally DIS for most positions.

Q Do you know of any instances in which candidates for appointments to noncareer positions in the Department of Defense who have been regarded as technically qualified have not succeeded in obtaining the necessary security clearances for those positions?

[67] A I know of no such cases.

Q Would you know?

A I would know if I had processed a case to the point of preparing the recommendation on the individual's qualifications and I would know then whether or not that individual was never appointed.

Q So as far as you know, every person who has been recommended for appointment and has been regarded as technically capable has obtained the necessary security clearances for the position?

A To the best of my recollection, yes, sir.

Q About how long does a security clearance take if there is an average or norm?

A It depends on what type of security clearance the individual already has.

If there is no clearance at all, it could take several months before they could issue an interim top secret clearance.

Q And am I correct that an individual selected for appointment to a noncareer position cannot be appointed to that position until the security clearances are approved by the Personnel and Security Director?

[68] A That is correct.

MR. LACOVARA: Thank you.

BY MR. KARRON:

Q For each of the steps that Mr. Lacovara has gone over with you, if an individual fails to receive approval or clearance, can that individual be appointed to the proposed position?

A No.

Q And would that individual be entitled to compensation from the United States Government?

A If they were not appointed?

Q Right.

A No.

Q Would that individual have any pension rights?

A No.

Q Entitlement to health benefits?

A No.

Q Sick leave?

A No.

Q Okay. And that person would never have entered on duty and performed functions for the United States Government, is that correct?

[69] A Yes.

Q Yes, that is correct, he wouldn't have?

A He would not have been appointed.

Q Okay. And if an individual does pass through all of these clearances, how is he or she notified of that?

A Our organization will normally contact the administrative officer in the organization that is hiring the employee and tell them that we are able to bring the individual onboard, depending upon the organization, and sometimes the administrative officer or another official works with the individual to develop a date for them to come onboard. In some cases we work with the individual ourselves. Sometimes there is a letter of commitment issued in writing.

Q Who would issue such a letter in those cases?

A If a letter is issued, it is normally signed out by the Personnel Office.

Q By your office?

A Yes, sir.

BY MR. LACOVARA:

Q Are we talking about noncareer Schedule C or SES appointees?

A Yes, sir. Now, this is a letter simply saying that [70] you know: We are pleased to announce that you have been selected for the noncareer appointment of whatever, and clearances—something to that effect—have been obtained and we can now offer you an appointment, and can negotiate a date to enter on duty, and we would be more than happy to discuss any questions you have in

terms of wrapping up the personnel processing of the appointment.

Q Is it your understanding that no one in the Defense Department is authorized, as you put it, to offer an appointment until your office has the necessary clearances that you have described, including the approval of the Assistant to the Secretary of Defense?

A To formally offer a position, that must be done after all of these clearances have been received from Security, from the Office of Personnel Management for the noncareer appointing authority, and from the Assistant to the Secretary of Defense for the noncareer appointment of the individual.

Q And from the White House political clearance process?

A Yes, sir.

BY MR. KARRON:

Q Is there an internal form used by your office or anyone else in the Department of Defense recording the [71] appointment of an individual?

A The appointment of an individual is ultimately recorded on what is known as Standard Form 50, a notification of personnel action.

We complete a Standard Form 52, which is a request for personnel action documenting the appropriate appointment information on a form that was originated normally by the OSD component that is hiring the individual, or will have the individual work for them.

Q And would one of those forms exist for each individual who receives an appointment?

A A Standard Form 50?

Q Standard Form 50.

A Yes, sir.

Q And we are talking about the noncareer SES, Schedule C Presidential appointees, are we not?

A Yes, sir.

Q And similarly would an SF-52 exist for such individuals?

A An SF-52 is a working document and may not necessarily be in a file. It is considered a temporary document and is not filed in the permanent side of the official personnel [72] file.

Q But the SF-50 would be contained in the individual's personnel file?

A Yes, sir.

Q Okay. The SF-52 might be?

A Yes, sir.

Q Now, once the individual has been notified of an appointment, are there any other—

MR. LACOVARA: Of the proposed appointment.

BY MR. KARRON:

Q Of the proposed appointment—are there any other clearances that that individual is required to obtain before he or she could actually report for work?

A For noncareer SES?

Q Right. All of this is for noncareer SES or Schedule C or Presidential appointee.

A When we contact the individual and say we are ready to appoint you, at that stage I don't consider it a proposed appointment. I consider a proposed appointment before we have all of the approvals. And in many cases we are in contact with a Schedule C or noncareer SES prospective member before the approvals have been received, acknowledging that you have [73] been selected for the position. Many of them will contact us asking for information on health benefit forms, et cetera.

So at the final stage for noncareers and Schedule C's we can offer an appointment, and all that is missing is a date to enter on duty. There are no approvals left.

Q Well now, would the individuals have filled out prior to receiving the notice of appointment financial disclosure forms, for example?

A Financial disclosure forms for noncareer SES members must be completed within 30 days after appointment.

Q And do you know whether those are provided to individuals who have received notices of appointment prior to their receipt of notices of appointment?

A I cannot say that they are not received. I do know that we ensure that SES members, both career and noncareer, that come on board talk to the Ethics Counselor and are provided an orientation on the form and what is required and answers questions then.

BY MR. LACOVARA:

Q May I ask a clarifying question?

Is the SF-50 a document that you describe as the notice of appointment?

[74] A It is a notification of personnel action. It documents the noncareer appointment, the date of the appointment, the job that they are appointed to, their pay level, the organization that they are appointed to.

Q It is a form that records action the government has taken?

A Yes, sir.

Q And that form is used for each change in the person's employment status, is that correct?

A Yes, sir. Every change that occurs.

Q Payroll change?

A Yes, sir.

Q Promotions?

A Correct.

Q Demotions?

A Correct

Q Is there such a thing as a notice of appointment that you are aware of?

A Not that I am aware of.

Q The letter that you describe that may be sent to a person who has been cleared, is that a standard form letter? That is, does it have a number as a standard form?

[75] A No.

Q So it is a letter that, as a matter of courtesy—

A Yes, sir.

Q —is sent to someone saying all of the processes have been completed and we are now ready to offer you an appointment to a particular position?

A Yes, sir.

Q Thank you. I was a little unclear about what would actually happen.

BY MR. KARRON:

Q If an individual receives such a letter, is that individual obligated to accept the appointment?

A No.

Q Are you aware of instances in which individuals, after receiving such a letter, have for any reason not come to work for the government?

A More often than not, letters are not sent.

I know of cases where individuals have been offered positions and have decided not to accept them. Whether or not a letter was written to them, I could not say.

* * * *

DEF. EX. 164

MFH:GAJones:yep
86-16-595

Staff Attorney:
Gordon A. Jones
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Washington, D.C. 20530

November 12, 1986

Philip A. Lacovara, Esquire
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Re: *United States v. The Boeing Company, Inc.*

Dear Mr. Lacovara:

This will formally confirm our conversations regarding several of the depositions of Defense officials. We are informed that there is no such "official in the Department of Defense who determined that the acceptance of said severance payment created a breach of duty or conflict of interest situation" with respect to the four defendants you represent in this civil action. Thus, no one meets the criteria set forth in the notices for the four depositions scheduled for November 14, 1986.

A similar problem exists with respect to the 30(b)(6) deposition scheduled for 2:00 p.m. on November 13, 1986, in that severance payments are not specifically required to be separately listed on the financial disclosure form "by persons leaving the private sector to accept appointments to the Executive Branch of the United States Government, especially the Department of Defense." As a result, no person can be designated by plaintiff who has knowledge of the requested information. Moreover, the information sought in the deposition

is virtually identical to the information sought in Interrogatory No. 3, except that deposition seeks information for three additional years. Thus, even if there were such a person whom plaintiff could designate, that person would be unable to provide the information requested for much the same reasons as stated in Plaintiff's Objection to Interrogatory No. 3 served on October 27, 1986.

Thus, for the five depositions discussed above, plaintiff is unable to find a person described in the Notices of Deposition or a person who is knowledgeable to give the requested testimony.

Very truly yours,

/s/ Gordon A. Jones
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DEF. EX. 167

[SEAL]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
Washington, D.C. 20301

April 5, 1983

MEMORANDUM FOR MS. BOCK

SUBJECT: Hearing on H.R. 1650, A Bill To "Re-authorize The Office of Government Ethics"

At your suggestion, today I attended the subject hearing. The possible DoD interest came to light when we were provided copies of letters written to Thomas Reed and other persons within OSD by Congressman Don Albosta, Chairman of the Subcommittee on Human Resources of the House Committee on Post Office and Civil Service. The letters advised the addressees that "the process involved in the preparation and analysis of your materials under the various disclosure requirements may be among the examples reviewed by the Subcommittee." The letters went on to say that the "purpose of the inquiry is not to focus on potential violations of substantive law but to assess the procedures and powers provided by Congress in the area of government ethics."

We were concerned that the hearing could delve into DoD matters under investigation or that the Chairman would require answers of the Office of Government Ethics (OGE) witnesses that such persons would not be qualified to give. I contacted the OGE witnesses and assisted them in understanding the process of review of confidential and public financial statements filed with the OSD. I also received their assurances that any questions pertaining to DoD policies and procedures would, to the extent they were able, be referred to this Department for answer.

The Chairman was the only member present. The opening witness was David R. Scott, Acting Director of the Office of Government Ethics. We orally delivered the statement that is attached (Tab W) and responded to a variety of questions. These questions included several regarding proposed changes in the Ethics in Government Act that would have revealed the postconfirmation payment received by Attorney General Smith; the need to increase the size of OGE to handle adequately all of the complicated problems that it addresses; procedures that may be necessary to prevent or identify questionable severance payments; general questions regarding administration of disclosure problems associated with the Environmental Protection Agency "Superfund" program and problems involving financial interests of matters of Presidential Advisory Committees.

Questions regarding DoD personnel involved only three persons. First, there were several questions about Navy Secretary Lehman and his actions in connection with the Abington Corporation. Mr. Scott answered these by reference to public statements that Mr. Lehman has made. Second, he was asked several questions regarding Assistant Navy Secretary Melvin Paisley and severance payments received from the Boeing Corporation. Mr. Scott reminded the Chairman that the matter was under investigation and that the current reporting procedures contained no requirement for segregating payments from employers into those that are severance payments and those that are part of regular compensation. Chairman Albosta dropped that issue after showing his displeasure over what he considered to be inadequacies the disclosure requirements. Third, Chairman Albosta called attention to the fact that Thomas Reed had not been required to file a public disclosure form. The Director of the OGE explained the applicable provision of the Ethics in Government Act and its requirement that only persons classified at the Grade of GS-16 and above are required to file financial a statement that is available to the public. Mr.

Scott acknowledged that persons serving in the higher levels of the GS/GM-15 rank actually could be paid more than a person at the GS-16, step 1 rank. Nevertheless, he explained that this is a peculiarity in the law that existed because the Congress, in establishing the reporting requirement based it upon grade level and not actual pay. Mr. Scott did not take issue with the application of the law by the Department of Defense nor was there any follow-up question by Mr. Albosta to indicate his belief that the law had not been applied correctly in Mr. Reed's case.

There were other witnesses who testified at the hearing. These included Clifford I. Gould, General Accounting Office, Ann McBride, Vice President for Program Operations of Common Cause, and J. Jackson Walter, former Director of the Office of Government Ethics and now the President of the National Academy of Public Administration. The statements prepared for delivery by Mr. Gould and Ms. McBride are found at Tab B.

Because there was no indication that the testimony of these other witnesses would raise matters of more than casual interest to DoD I did not attend that portion of the hearing. I have been in touch with the OGE representatives who confirmed that I missed nothing of value.

DAVID W. REAM

cc: Karl Becker
T.K. Jones (without attachments)

PETITIONER'S

BRIEF

No. 88-931

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF LAWRENCE H. CRANDON, *ET AL.*

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QUESTIONS PRESENTED

1. Does 18 U.S.C. § 209, which makes it a crime for a person to pay supplementary compensation for "services as an officer or employee of the executive branch of the United States" to "such officer or employee" and similarly prohibits receipt of such a payment, impose civil and criminal liability (a) on a private corporate employer that pays a fixed, irrevocable severance payment to its departing employee who has not yet become a federal "officer or employee" and (b) on the private-sector employee who receives that payment?

2. When a new federal employee makes timely disclosure of the receipt of a severance payment from his former employer to his new government superiors, to agency lawyers, to designated agency ethics officials, and in government forms completed in compliance with the government's instructions and regulations, do those disclosures dissipate any "potential" conflict of interest resulting from having received or retained the severance payment and thus bar a common law "quasi contract" claim for maintaining a potential conflict of interest?

3. Did the court of appeals overstep the bounds of review of trial court findings of fact when the appellate court assumed that the individual recipients of severance payments had intended to receive the payments as "compensation for government service," even though (a) the district court had specifically found, after a full trial and on the basis of ample evidence, that they lacked that intent, and (b) the court of appeals did not overturn that finding as "clearly erroneous" or even address their intent in accepting the payments?

LIST OF PARTIES

The defendants in the district court and appellees in the court of appeals were The Boeing Company (which is filing a separate brief on the merits in No. 88-938) and the petitioners in this case, Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds.

The United States was the plaintiff in the district court and the appellant in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-931

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF LAWRENCE H. CRANDON, *ET AL.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 845 F.2d 476, and is reprinted in Appendix A to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The opinion of the District Court for the Eastern District of Virginia is reported at 653 F. Supp. 1381, and is reprinted in Appendix B to the Petition (Pet. App. at 15a).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. (Pet. App. 28a). On September 7, 1988, the court of appeals denied a timely petition for rehearing. (Pet. App. 29a). A timely petition for certiorari was filed on December 5, 1988. This Court granted certiorari on April 3, 1989. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 18 U.S.C. § 209(a). That statute is quoted in the Petition (at 2) and is reprinted (along with its predecessor, former 18 U.S.C. § 1914) in Appendix A to this brief.

STATEMENT

Petitioners are five former employees of The Boeing Company who, at the urging of the government, left the employ of Boeing and accepted senior positions with the Defense Department. Invoking a criminal statute, 18 U.S.C. § 209, and common law principles of "fiduciary loyalty," the Justice Department brought this civil action against Boeing and the petitioners seeking to recover severance payments that Boeing had made to its employees before they entered federal service. The government relied on Section 209, which makes it a crime for a person knowingly to pay, or a federal official knowingly to accept, a "supplementation of salary, as compensation for . . . services as an officer or employee" of the government. After trial, the district court rejected the government's theories on both the facts and the law, but a divided panel of the Fourth Circuit reversed. The Fourth Circuit denied rehearing *en banc* by a vote of 6 to 5.

A. The Government's Recruitment Of The Petitioners

In 1981 and 1982, the Defense Department actively recruited the petitioners for high-level government positions: Thomas K. Jones, as Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces; Harold Kitson, Jr., as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence; Melvyn R. Paisley, as Assistant Secretary of the Navy for Research Engineering and Systems; Herbert A. Reynolds, as Deputy Director of Space and Intelligence Policy, Office of the Undersecretary of Defense for Policy; and Lawrence H. Crandon, as a NATO Air Defense Scientist.

To avoid needless repetition, we shall generally focus in this statement on the circumstances of T.K. Jones, the first of the five petitioners to enter government service. The relevant facts with regard to Jones are representative of the facts pertaining to the other four petitioners, and their conduct was in large part guided by what Jones knew and did.[1]

Jones had been an employee of The Boeing Company for over twenty years. In May 1981, Jones, a strategic nuclear weapons expert who previously had served the government as a member of the United States Strategic Arms Limitation Talks team in the early 1970s, received a telephone call from Dr. James Wade, the Principal Deputy to the Under Secretary of Defense for Research and Engineering. Dr. Wade asked Jones to come to the Pentagon to discuss the possibility of returning to government service. JA 461. Dr. Wade and the Under Secretary of Defense, Dr. Richard DeLauer, strongly encouraged Jones to accept the position of Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces. In fact, Dr. Wade was emphatic that Jones "had to accept the job of helping" the government. JA 199. Jones agreed to become a candidate for the proposed government position. JA 37, ¶ 118; Pet. App. 17a-18a, ¶¶ 9-14. Under Secretary DeLauer's Executive Assistant, however, "made it quite clear" that actual appointment

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[1] Thus, the parties stipulated that "in light of the similarity of issues and facts, the parties agree that the disposition of this matter as to defendant T.K. Jones will also govern the Government's claim against Mr. Herbert Reynolds." JA 108. Similarly, the parties agreed that petitioner Kitson's testimony was unnecessary at trial because "he would testify about his severance payment and what he did and what he knew on the same terms that Mr. Paisley and Mr. Jones have testified to." JA 236. ("JA" refers to the Joint Appendix filed in this Court; "LE Ex." refers to the selected trial exhibits lodged with the Court.)

was "subject to a great many unspecified approvals." JA 462.[2]

B. Receipt Of The Severance Payments

Jones knew that he might be eligible for a severance payment in accordance with Boeing practice, because he had been the recipient of such a payment in 1971 when he left Boeing and joined the SALT team. JA 209-10, 465. In fact, before the government formally offered any of the men their positions, they each learned that, if they left Boeing, they might be eligible for severance payments in accordance with what the district court found to be Boeing's "long-standing practice of making severance payments" that completely dissolved the financial relationship between the company and employees who left to enter federal service. Pet. App. 16a, ¶ 5. *See also* JA 23, ¶ 5; 47-48, ¶ 3 (Crandon); 66, ¶ 6 (Kitson); 72-73, ¶ 6 (Paisley); 76, ¶ 8 (Reynolds).

In response to invitations from Boeing personnel officials, Jones and the other employees prepared and submitted to Boeing their own estimates of "all of the financial impacts attendant with leaving Boeing" at that stage of their careers. JA 26, ¶ 25; 204. *See also* JA 27, ¶ 41 (Paisley); 29, ¶ 55 (Reynolds); 31, ¶ 72 (Kitson); 33, ¶ 87 (Crandon). In estimating the probable financial impact of leaving Boeing, Jones attempted to envision all possible economic consequences and submitted six pages of figures and calculations to Boeing. LE Ex. 10.[3]

Among the losses that Jones identified were various accrued but non-vested benefits that were based solely on

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[2] The other petitioners were recruited in similar fashion. *See* JA 27, ¶ 39; 31, ¶ 71; 39, ¶ 136; 68, ¶ 3; 72, ¶ 5; 76, ¶ 6.

[3] Similarly, Paisley's assessment covered 18 pages. LE Ex. 11. *See also* LE Ex. 12 (Reynolds); LE Ex. 13 (Kitson).

his past service to Boeing. Testifying for petitioners at trial, the Secretary of the Navy termed these accrued but unvested benefits the "golden handcuffs" that corporations use to discourage valued employees from leaving the corporation before retirement. JA 227-28. In Jones' case, these forfeitable benefits included unvested matching contributions that Boeing had made to Jones' Voluntary Investment Plan; sick-leave and vacation benefits that had already been earned but would not ordinarily be redeemed if an employee left Boeing voluntarily to go to work for a competitor; the forfeiture of stock options that had been granted but were not yet exercisable; and the adverse financial impact of being forced immediately to liquidate all Boeing stock interests. JA 204-07, 219-22; LE Ex. 10. *See also* JA 169-71 (Paisley); 490 (Kitson). For some of the men, these losses also included retirement benefits that would be forgone as a result of taking early retirement from Boeing.[4]

The government's case, however, focused on the single fact that in compiling these lists of all possible financial impacts, Jones and the other petitioners also included obvious reductions in income and increases in living expenses that would be incurred if a Boeing employee accepted a government position and moved from Seattle to the Washington, D.C. area. The inclusion of that single item—potential salary differential—among all the various factors catalogued became the basis for the Justice Department's later claim that both the award and the receipt of the severance payments were illegal.

Before leaving Boeing, Jones received a lump-sum severance payment of $132,000—less than $7,000 for each

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[4] Paisley and Kitson took early retirement from Boeing rather than resigning. JA 66, ¶ 5 (Kitson); 73, ¶ 7 (Paisley).

year of service to Boeing. By contrast, the figures that he had submitted to Boeing showed that the adverse impact of leaving Boeing at that stage in his career approached $450,000. JA 481. Similarly, Paisley had estimated a financial impact of approximately $825,000, but he received a severance payment of $183,000, minus withholding taxes—less than one-fourth of his estimate. JA 27-28, ¶¶ 41, 42.[5]

Neither Jones nor any of the other men ever knew the basis on which Boeing had calculated the amounts of their severance payments. They also did not know which of the many financial factors, *if any*, Boeing had taken into account in deciding the appropriate amounts of the payments. JA 59, ¶ 13. *See also* JA 47-48, ¶ 3 (Crandon); 72-73, ¶ 6 (Paisley); 76, ¶ 11 (Reynolds); 515 (Kitson). Jones testified that the "amount of severance pay that I received was not equal to any individual figure in my estimate, nor could I duplicate that figure by combining any of those estimates." JA 482.[6]

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[5] Crandon received $40,000; Kitson received $50,000; and Reynolds received $80,000. Pet. App. 2a-3a.

[6] In recommending the appropriate range of severance payments, Boeing personnel staff apparently performed some calculations that were based in part on the difference between Boeing salary and prospective government salary over an assumed period of service. The final decision whether to make the payments, however, and what the amount of payment should be rested with Boeing's chairman, who testified that he determined the actual amounts to be paid on the basis of what he decided was the proper reflection of the employees' years of contribution to Boeing. Exercising that judgment, he ordered changes in at least one of the proposed payments. JA 45-46, ¶¶ 5-7; 287; 330-31; 415-16.

The district court found that "[t]hose responsible for the ultimate decision were not aware of the specific calculation method followed by the Industrial Relations Staff, and approved severance payments to the individual defendants based on their determination that the proposed payment was reasonable and fair to the departing employee." Pet. App. 19a, ¶ 20.

Jones was told that the purpose for Boeing's unconditional termination payment was "to sever all financial ties, and to avoid any conflict of interest that might result from retained financial ties." JA 204-05; Pet. App. 20a, ¶ 25. *See also* JA 47-48, ¶ 3 (Crandon); 66, ¶ 9 (Kitson); 78, ¶ 17 (Reynolds); 172 (Paisley). Accordingly, Jones viewed the payment as "a liquidation of my interests in the company and therefore as a means to insure that all financial ties were severed." JA 484. The district court found that the severance payments "provided a mechanism to completely sever all financial ties between Boeing and the departing employee." Pet. App. 16a, ¶ 5.

At the time Jones and the others received the payments, they had not been appointed to, or even formally offered, any government position. The government stipulated that, at the time, the men had no right to any federal employment nor had the government assumed any obligations to them. JA 26, ¶ 26. *See also* JA 28, ¶ 43 (Paisley); 29, ¶ 57 (Reynolds); 31-32, ¶ 75 (Kitson); 33-34, ¶ 90 (Crandon). Jones testified, for example, that his prospective superior, Under Secretary DeLauer, made it quite clear that he "could only submit my application and endorse it." JA 208. Jones' uncertainty over whether the federal appointment would ever come through was heightened by his personal knowledge of a person in a similar situation who had sold his home and moved to Washington, D.C. expecting to work for the Pentagon only to have the appointment fall through: "So, I was quite aware that not only was I not appointed, but there were risks that I might never be." JA 208.[7]

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[7] In 1981 and 1982 when the government was recruiting the petitioners, the uncertainty that their appointments might never come

Despite this uncertainty, the severance payments were for Jones and the other departing employees to keep, regardless of *whether* they actually survived the screening process and received the proposed government appointments, and regardless of *how long* they might stay with the government or *what their salary levels might be* if the proposed appointments came through. JA 210. *See also* JA 48, ¶ 4; 77, ¶ 15; 172-73; 186; 522; 539-40. As the district court found:

> "The severance payments made to the individual defendants were not contingent upon the individuals entering into federal government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at anytime in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future." Pet. App. 18a, ¶ 17.

C. Disclosure To The Government

Jones discussed with various Defense Department officials the propriety of receiving the proposed severance payment and accepted it *only after* having been assured that such a payment was permissible and even customary.

Among those to whom Jones disclosed first the possibility and later the fact of his severance payment were his superiors, the Under Secretary of Defense, the Deputy Under Secretary, and the Under Secretary's Executive Assistant, Colonel Hollander. JA 209-11, 474-75, 479. Under Secretary DeLauer testified:

> "During our discussions about his potential appointment, Mr. Jones mentioned to me that he had received a severance payment from Boeing when he entered government on a prior occasion and that he anticipated that he might receive another such payment if he left Boeing in 1981 to accept government service. I assured Mr. Jones that many top-level appointees coming into government from the private sector received severance payments upon their departure to enter government, and that I saw no problem if Mr. Jones was provided with a severance payment from Boeing." JA 51, ¶ 6.

The district court specifically found that, in response to his inquiries and disclosures, Jones had been "assured that he could accept the anticipated severance payment." Pet. App. 20a, ¶ 26. Significantly, none of these responsible federal officials suggested that Boeing's method of calculating the payment could transform it into a violation of a criminal statute.[8]

After receiving his government appointment, Jones disclosed his actual receipt of the payment to responsible government officials, including "Designated Agency Ethics Officers" ("DAEOs") at the DoD. Jones also completed the government SF 278 Financial Disclosure Report and included the severance payments as income received from Boeing, as the government's instructions provided. Jones

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through was very real indeed. On January 20, 1981, President Reagan froze "all Federal hiring" and made the freeze retroactive to November 1980. It was estimated that this order affected as many as 20,000 people, and that *"thousands of potential Federal employees, with job offers in hand, had sold their homes and even moved thousands of miles believing that they had work,"* only to be disappointed. "U.S. Hiring Freeze Upheld by Court," *New York Times*, Feb. 26, 1981, at B14, col. 1 (emphasis added). *See also* "Hiring Freeze Causes Havoc in Some Agencies," *Washington Post*, Jan. 29, 1981 at A1, col. 1.

[8] Other petitioners made similar disclosures. For example, Paisley told the Secretary of the Navy and attorney Joseph Duffy of the Navy General Counsel's Office about his anticipated severance payment, and was told that it posed no problem. JA 172-75. He also disclosed it to the staff of the Senate Armed Services Committee in connection with his confirmation. JA 174-76. Similarly, the Secretary of the Navy testified that he assumed that Kitson would receive a severance payment from Boeing and saw no problem with it. JA 230.

specifically discussed his severance payment with David W. Ream, an attorney at the Office of the General Counsel of the Department of Defense who was the Defense Department's expert on ethics issues, and requested instructions on how "to fit the individual types or pieces of income which I had received from Boeing into the various lines and squares and check-off blocks of this form." JA 211-13. *See also* JA 474-75. Ream instructed Jones that "what was required was the total amount and from whom it was received. And so, that is what appears on this form." JA 213-14. Under Secretary DeLauer, one of Jones' superiors who knew of the severance payment from the beginning, also reviewed the SF 278 and unequivocally concluded that "Mr. Jones disclosed the amount of the severance payment from Boeing appropriately on the form that he filed in 1981." JA 51, ¶ 7. The Under Secretary further certified and then testified that he was "satisfied that there is no actual or potential conflict of interest." JA 213-14; LE Ex. 3. Finally, Jones' SF 278 was reviewed by DAEOs who certified that "[t]he information contained in this report discloses no conflict of interest under applicable laws and regulations." LE Ex. 3.[9]

D. Petitioners' Government Service

While employed by the government, Jones and the other petitioners were not responsible for Defense Department contracting or procurement decisions. JA 55, ¶ 8; 484-85. *See also* JA 34, ¶ 99; 48-49, ¶¶ 4-6 (Crandon); 67, ¶ 12 (Kitson); 81, ¶ 11 (Reynolds); 175-76 (Paisley).

[9] Three of the other petitioners also filed SF 278 Financial Disclosure Reports that included the severance payments as income received from Boeing. Their filings similarly received approval from the appropriate DAEOs. *E.g.*, JA 54, ¶ 4; 173-74; 208-10; 211-13; LE Exs. 3, 22, 23, 25. Crandon's position did not require filing a Financial Disclosure Report. JA 34, ¶ 91.

The district court found that "[n]one of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government employee." Pet. App. 26a. Moreover, during their terms of government employment, Jones, Reynolds, Kitson, and Crandon specifically disqualified themselves from any Defense Department dealings with Boeing. Pet. App. 20a, ¶ 27. Paisley generally recused himself from dealings with Boeing, and partipated in selected Boeing-related issues only after receiving a specific direction to do so from his superior, the Secretary of the Navy. Pet. App. 20a, ¶ 27. *See also* JA 229-30, 585.

The government has conceded, and the district court found, that the "government supervisors" of *each* of the petitioners "were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest." Pet. App. 19a, ¶ 23; JA 27, ¶ 33; 28, ¶ 50; 30, ¶ 65; 32-33, ¶ 84; 35, ¶ 101. The government, in fact, agreed not to contest the fact that the petitioners "did not provide [Boeing] with any preferential treatment or special advantages during their tenures with the government," (JA 35, ¶ 105), and the district court specifically so found. Pet. App. 19a, ¶ 21.

For his outstanding dedication, Jones was presented with the Department of Defense Medal for Distinguished Public Service, together with a citation from Secretary of Defense Caspar Weinberger. JA 485. In similar fashion, Secretary Weinberger recognized Reynolds' "exceptional leadership" and "unstinting and selfless devotion to duty" in awarding him the Secretary of Defense Medal for Meritorious Civilian Service. JA 81, ¶ 14. The Secretary of the Navy testified at trial that Assistant

Secretary Paisley "has been rendering outstanding public service in the highest traditions of our government," (JA 70, ¶ 8; 228-30), and that Deputy Assistant Secretary Kitson "enjoyed an excellent reputation for capable and dedicated service" and that his performance "was outstanding in every way." JA 70, ¶ 11; 230.

E. Trial Court Decision Finding No Liability

In 1986, more than four years after the petitioners received their severance payments in 1981 and 1982, and after three of them had completed their public service, the Justice Department filed a civil suit against Boeing and the recipients of those payments. The government claimed that Boeing's payment of the severance, and each man's receipt of his severance payment, violated the standard of fiduciary loyalty established by 18 U.S.C. § 209. The government sought to recover *twice* the amount of the severance payments (plus interest or "traced profits") — once from Boeing and once from each recipient.

The claims were tried to the court. The trial judge heard live testimony from two of the five individual defendants and the Secretary of the Navy. The parties stipulated that, if called, the testimony of two other defendants would be similar. JA 108, 236. The judge also received into evidence eight depositions (including those of two of the other individual defendants and various Boeing officials) and hundreds of exhibits.

After several weeks of deliberation, the trial judge filed a detailed opinion dismissing all of the government's claims. The judge held as a matter of law that, in light of the language of Section 209 and the structure of the conflict-of-interest chapter, 18 U.S.C. §§ 201 *et seq.*, "the acceptance of a severance payment by a non-government employee does not violate 18 U.S.C. § 209." Pet. App. 24a. The judge also found as a fact that, even if Section 209 applies to pre-government employment severance payments, the payments here did not violate Section 209 because neither Boeing nor the individuals intended the payments "as a supplementation to their government salaries or as compensation for their government services." Pet. App. 24a-25a. *See also* Pet. App. 19a, ¶ 19. In addition, the judge found that the petitioners' disclosure of the payments in accordance with government regulations obviated any "potential conflict of interest" that might otherwise justify extracting the pre-employment payments from them many years after they had rendered their faithful government service. Pet. App. 20a, 24a-25a.

F. Reversal By A Divided Court Of Appeals

A divided panel of the court of appeals reversed. The Fourth Circuit overturned the district court's conclusion that Section 209 does not apply to severance payments made prior to entry into government service. Pet. App. 5a-6a. In addition, while the court of appeals agreed with the trial court that liability can be imposed under Section 209 only when the defendant specifically intends to pay or receive the money "as compensation for government service," the majority rejected the trial judge's finding that Boeing did not possess the statutorily proscribed intent in making the payments. The court of appeals ruled, based on its own assessment of the evidence, that Boeing must have had the requisite intent.

The panel never addressed the *individual* recipients' intent in *receiving* the payments. Instead, ignoring the trial court's specific finding that the individual Boeing employees did not believe that the severance payments were intended as additional "compensation" for performing future government services, the majority simply declared that the recipients were liable for breaching their duty of loyalty to the government by accepting payments *given*—as the panel believed—with the intent to "supplement" their government compensation. The panel also rejected the trial judge's finding that the individuals' disclosures of the payments and their subsequent exemplary

performance foreclosed a damage claim based on a "potential" conflict of interest.[10]

Judge Hall, in dissent, objected that intent is an issue peculiarly within the province of the trier of fact and that the trial judge had not committed clear error in crediting the uniform live and deposition testimony of ten witnesses that neither Boeing nor the employees had had the requisite intent.

SUMMARY OF ARGUMENT

I.

The government invoked 18 U.S.C. § 209 as the source of a "duty of loyalty" allegedly breached when the petitioners accepted the severance payments at issue. Section 209 by its terms, however, does not apply to payments made to a person who is not actually an "officer or employee" of the United States.

The statute makes it an offense for a person to pay a supplementation of salary "*to* . . . any . . . *officer or employee*" of the United States as "compensation for his services *as* an *officer or employee* of the executive branch . . . ." (Emphasis added.) It also makes it a crime to receive such a "supplementation of salary" as "compensation for . . . services as an officer or employee" of the government. It is undisputed that when the severance payments were made in this case, the petitioners were not government employees.

The legislative history confirms the plain meaning. Section 209 is a recodification of former 18 U.S.C. § 1914, which indisputedly would not have applied to pre-federal employment payments such as the severance payments in

[10] The court of appeals affirmed the district court's ruling that four of the five claims *against Boeing* were barred by the three-year statute of limitations governing tort claims (28 U.S.C. § 2415(b)), but held that claims against the employees are governed by a six-year statute governing "implied contracts" (28 U.S.C. § 2415(a)) and were not time-barred. Pet. App. 10a-11a.

this case. Nothing in the committee reports or debates suggests that Congress intended a relatively minor language change in the new statute to have the effect of expanding coverage of the statute to encompass an entire, new class of conduct and persons. To the contrary, the only expression of congressional intent regarding new Section 209 was the desire to *narrow*, not expand the scope of the statute. In fact, in a contemporaneous interpretation of the 1962 recodification, Attorney General Kennedy expressed the view that Section 209 made *no* substantive changes from former Section 1914.

The structure of the 1962 recodification of Section 209 and other conflict-of-interest statutes also confirms this conclusion. Congress made *other* sections of the 1962 law *expressly* applicable to payments made to or received by nominees for federal positions before they actually commenced their federal employment. Section 209 does not include similar provisions. The Justice Department's new, expansive interpretation of Section 209 also undermines the overriding policy of the 1962 revisions—to strike a better balance between the government's twin interests in promoting ethical behavior and in eliminating unnecessary obstacles to federal recruitment.

Furthermore, it is a fundamental principle of agency law—as incorporated into the federal common law that underlies the government's claim in this case—that there can be no fiduciary duty where there is no fiduciary relationship. When they received their severance payments, petitioners were not "officers or employees" of the United States. Since the government disclaimed any employer-employee relationship with petitioners, it cannot fairly assert that they had a unilateral duty of "undivided loyalty" to the government.

II.

Since Section 209 does not create a civil cause of action, the government brought this case as a civil action for breach of fiduciary duty under federal common law, al-

leging that the severance payments created a "potential conflict of interest." Consistent with principles of agency law developed in state courts, federal courts have held in such cases that, where a federal employee discloses an outside financial relationship—thereby allowing the government to protect itself against any potential conflict of interest—there can be no liability for breach of duty of loyalty.

Here, the individual petitioners fully and adequately disclosed their relationship with Boeing. Even before the petitioners accepted the severance payments, they specifically disclosed the fact and amount of the payments to high Defense Department officials, including those with special ethics responsibilities. Petitioners were assured, *before* they accepted the payments, that the severance payments were lawful and, indeed, commonplace.

In addition, petitioners complied with all applicable disclosure regulations and included the severance payments on their financial disclosure forms in accordance with the government's instructions and regulations and with the specific advice of government lawyers. Defense Department ethics officers—who are required to consider whether Section 209 is being violated—reviewed the forms and certified that they disclosed no conflict of interest. Those same ethics officers, who by regulation must request additional information from federal employees if a disclosure is inadequate, never asked for details about the severance payments or their method of calculation.

Furthermore, the DoD's audit agency was made aware —shortly after, or in some cases before, the petitioners began their federal services—of the payments, the amounts, and all the factors Boeing considered in calculating those payments. When the employer knows of the relevant facts and acquiesces in the employee's conduct, the employee's financial relationship with a third party does not constitute an actionable "conflict of interest."

III.

As both courts below held, to violate Section 209, a defendant must specifically intend the payment to be compensation for government services. The district court found, after a full trial, both that Boeing lacked the requisite intent and, in particular, that the individual petitioners "did not understand the severance payments to be compensation for their services to the government . . . ." The Fourth Circuit overturned the finding regarding Boeing's lack of intent as "clearly erroneous." The court of appeals, however, did not address the separate question of the *individuals'* lack of intent. Nevertheless, the court imposed liability on the individuals, presumably based on its belief that Boeing must have harbored an improper intent. That disposition is inconsistent both with the separate intent requirements of Section 209 and the requirement that appellate courts must respect the trial courts' findings of fact.

The trial court's finding that the individual petitioners lacked the requisite intent is amply supported by the unrebutted testimony of *each* petitioner and other witnesses. Furthermore, each petitioner received the payment at a time when it was uncertain whether he would receive a federal appointment; yet the payments were fixed, irrevocable, and not contingent upon entry into government service or any particular period of federal employment, job responsibilities, or salary level. The very characteristics of the payments, therefore, belie the inference that the petitioners must have understood them to be compensation for government service they might—or might never—render.

ARGUMENT

I. 18 U.S.C. § 209 DOES NOT AUTHORIZE A CIVIL ACTION BY THE GOVERNMENT TO RECOVER FIXED, IRREVOCABLE SEVERANCE PAYMENTS THAT PRIVATE-SECTOR EMPLOYEES RECEIVE FROM THEIR PRIVATE EMPLOYERS BEFORE ENTERING FEDERAL SERVICE.

The government brought this lawsuit as a federal common law claim for breach of a "duty of loyalty." Although Section 209 does not purport to create any civil liability, the government relied solely on that statute as defining the scope of the "duty" petitioners allegedly breached. Even if the government can create a civil claim based on Section 209, however, the government has no case here. Section 209 simply has nothing to do with the receipt of a severance payment from a private-sector employee's private employer before the recipient becomes a federal employee.

The government has acknowledged that severance payments to persons who leave the private sector to enter federal service are common. Appellant's Brief in the Court of Appeals, at 16-18 ("Appellant's Br."). Yet, the Justice Department also has formally conceded that, although Section 209 has been on the statute books in its current form for 27 years and its predecessors go back at least 80 years, this is the *first* time the government has ever brought a civil or criminal case against anyone for receiving a severance payment, and this is the only time the government has tried to apply Section 209 to a person receiving any kind of payment *before* entering federal service. JA 35, ¶ 102. The government's novel effort to apply Section 209 to a person who is not serving as a federal employee and is not performing federal duties *at the time* he receives the payment is at odds with the language of Section 209 and the clear intent of Congress in enacting Section 209.

A. Neither The Text Nor The Purpose Of Section 209 Applies Its Restrictions To Severance Payments Received Prior To Appointment As A Federal Officer Or Employee.

1. Congress enacted 18 U.S.C. § 209 in its present form in 1962 as part of a recodification of government ethics statutes. Section 209 makes it a criminal offense for a person to receive "any contribution to or supplementation of salary," as "compensation for his services *as an officer or employee* of the executive branch of the United States" from any source other than the government. (Emphasis added.) The statute also makes it an offense for a person to pay additional compensation "*to* any *such officer or employee*" for performing federal service. (Emphasis added.)

On its face, therefore, Section 209 applies only to certain compensatory payments made "to" an incumbent "officer or employee" of the federal government. Similarly, a person violates the section by receiving a payment only when he takes the payment while in office as compensation "for his services *as* an officer or employee of the government." If there were any ambiguity on this issue, settled principles of due process would require that this criminal statute be strictly construed against the government. *See Bouie v. Columbia*, 378 U.S. 347, 362-63 (1964); *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

2. Moreover, the history of Section 209 eliminates any fair basis for the government's present construction of this statute. Section 209 was a recodification of former 18 U.S.C. § 1914. That statute had made it an offense for a person, "*being a Government official or employee*," to receive from a non-governmental source "any salary in connection with his services as such an official or employee." The statute also made it an offense for anyone to make such a prohibited payment.[11]

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[11] Former 18 U.S.C. § 1914 as well as 18 U.S.C. § 209(a) are set forth in Appendix A to this brief.

It is undisputed that Section 1914 applied only to payments made to or received by incumbent government employees. Unquestionably that statute could not have applied to petitioners in this case, who had no employment relationship with the government at the time they received their severance payments. JA 26, ¶ 26; 28, ¶ 43; 29, ¶ 57; 31-32, ¶ 75; 33-34, ¶ 90.

While conceding that former Section 1914 did not cover payments to persons who were not government employees, the government claims (and the Fourth Circuit agreed) that Section 209 *does* apply to such payments. The government has argued that, because Congress dropped the language "being a government employee" when it recodified former Section 1914, it must have intended to broaden the scope of former Section 1914 to reach pre-employment severance payments. There are several fatal flaws in this ambitious attempt to create an ambiguity in this criminal statute and then resolve it in favor of broadened construction.

First, the government ignores the fact that even Section 209, in outlawing the making of some compensatory payments for services as a federal official, refers *only* to payments "to . . . any such officer or employee . . . ." Payments to anyone who is not "such [an] officer or employee" are plainly not covered. As the Senate Report on Section 209 explained, the statute forbids paying salary supplements *"to a Government employee . . . ."* S. Rep. No. 2213, 87th Cong., 2d Sess., at 14, *reprinted in* 1962 U.S. Code Cong. & Admin. News 3852, 3863 (emphasis added) (*"Senate Report"*).[12] Thus, in 1962 Congress clearly carried forward its earlier exclusive focus on payments to persons who are actually "officers or employees" of the United States when the payment is made or received.

Second, if Congress had desired to make a dramatic change in the law to cover receipt of pre-employment payments—even though Section 209 plainly does not

[12] Excerpts from the *Senate Report* are set forth in Appendix B to this brief.

apply to *making* such payments—it would have done so clearly and explicitly. Nothing in the legislative history, however, suggests that Congress, in making relatively minor changes in the language of a statute that undoubtedly did not encompass pre-employment severance payments, intended to apply this recodified criminal statute to a whole new class of persons and conduct. To the contrary, the *only* explanation in the House and Senate Committee reports for revising the language of former Section 1914 emphasized that Congress wanted to *narrow*, not expand, the stautory scope. The Committee reports explained that Section 209 would maintain the limited focus of Section 1914, and that the *only* substantive change in statutory coverage was to eliminate potential *overbreadth* by replacing the vague phrase " 'in connection with' an employee's Government services" with the narrower phrase " 'as compensation for' such services" as a federal employee. *Senate Report*, *id.* *See also* H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961), at 24-25 (*"House Report"*).[13]

In telling contrast, the committee reports and debates are absolutely silent regarding the elimination of the phrase "being a government official or employee" in the recodified statute. If Congress had intended the elimination of these six words to have the effect of subjecting innumerable private employers and employees to new criminal liability, surely it would have explained a desire to *expand* the coverage. Yet nothing in the committee reports or debates surrounding the enactment of Section 209 refers to pre-employment severance payments from private sector employers even as a matter of congressional concern. The absence of any such explanation is hardly surprising, since there was no suggestion that the Kennedy Administration, which had proposed the amendments, viewed pre-employment severance payments as a problem that required new criminal prohibitions. *See President's Message Relative to Ethical Conduct in*

[13] Excerpts from the *House Report* are set forth in Appendix C to this brief.

the Government, H.R. Doc. No. 145, 87th Cong., 1st Sess. (Apr. 27, 1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 1141.[14]

Rather than trying to outlaw pre-employment severance arrangements with private employers, both Section 209 and its predecessor were aimed only at the distinct problem of the "Government official or employee who receives compensation from a private source for his Government work" while he is on the public payroll performing public duties. *House Report* at 3. The object was to ensure that the government alone is paying its own employees for performing their duties, thus avoiding the "divided loyalty" that would arise if a federal employee is being paid by "two masters" for performing the same jobs.[15] That concern simply does not arise when a private sector employee has received an irrevocable severance payment from his own employer *before* entering into government service. In these circumstances, the government employee cannot be tempted to consider how his performance of government duties may either jeopardize or generate "supplementary compensation" from a private benefactor.[16]

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[14] Indeed, one of the highest ranking members of the Kennedy Administration, Defense Secretary Robert S. McNamara, was paid $618,750 in "severance" payments by his former employer, the Ford Motor Company. *See, e.g.*, "McNamara To Get $618,750 As Bonus," *New York Times*, Jan. 22, 1961, at 49, col. 6. Surely an administration intending to criminalize pre-employment severance arrangements would not have tolerated such conduct by one of its most prominent members, or at least would have declared explicitly that new restrictions on such payments were needed. The *President's Message* is set forth in Appendix D to this brief.

[15] *See, e.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961), where this Court recognized the moral admonition underlying the conflict-of-interest statutes that "no man may serve two masters, Matt. 6:24 . . . ."

[16] There is no reason, for example, why petitioner Crandon would feel more loyalty or gratitude toward Boeing for a one-time $40,000 severance payment irrevocably made *prior* to entering federal service than the Deputy Secretary of State will feel toward Kissinger

3. The structure of the 1962 recodification confirms that Congress chose its language carefully to continue to have Section 209—but not some of the other conflict-of-interest statutes—apply only to *incumbent* federal employees. For example, the federal bribery statute, 18 U.S.C. § 201, which Congress enacted at the same time as Section 209, applies to a corrupt payment to influence the performance of a "public official *or person who has been . . . selected to be a public official.*" 18 U.S.C. § 201(b)(1) (emphasis added). The *House Report* explains that this language "is included in order to set forth the point at which a *prospective* public official comes within the statutory coverage." *House Report* at 18 (emphasis added). Congress, in a classic exercise of its legislative judgment, chose to make the *bribery* statute (Section 201) apply not only to those who are currently serving as public officials but also to those who have been *selected* to serve as public officials. *See also* 18 U.S.C. § 203 (made expressly applicable to members-elect of Congress).

In sharp contrast, Section 209 applies only to supplementary salary payments made "to . . . such" an incumbent "*officer or employee*" of the United States. Thus, Congress was acutely sensitive to the distinction between *current* federal employees and *prospective* federal employees when it enacted the conflict-of-interest statutes, including Section 209. Congress deliberately chose *not* to include *prospective* federal employees within Section 209—just as it chose *to* include them in Section 201.

Indeed, in the bribery statute, Congress actually defined a "person who has been selected to be a public official" to mean "any person who has been nominated or

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Associates for an almost $200,000 payment, or the Deputy Secretary of Labor will feel toward Covington & Burling for *annual* payments of $108,000, to be received *after* entering federal service—which payments the government has approved. "Scowcroft's '88 Income Was $500,000," *Washington Post*, Mar. 14, 1989, at A7, col. 1; "U.S. Allows Long-Term Severance Pact," *Washington Post*, May 20, 1989, at A11, col. 4.

appointed to be a public official, or has been officially informed that such person will be so nominated or appointed." 18 U.S.C. § 201(a). Even that broad definition, however, would not have encompassed the petitioners, since the government conceded below that none of them had been "nominated or appointed" to office or "officially informed" that he would be so nominated or appointed when he accepted his severance payment. *See* JA 26, ¶ 26; *see also* JA 589-90, 597-604.

It would be bizarre indeed, therefore, to accept the government's expansive interpretation of Section 209 as applying to severance payments made to petitioners before they had even been officially appointed to office or informed of an impending appointment. After all, Congress has decided that it is unnecessary to make even the more comprehensive bribery statute apply to payments made at that time, even if made with the most egregiously corrupt intent.

4. In fact, while the Justice Department now takes the view that Section 209 expands the coverage of old Section 1914 to apply to pre-employment severance payments, its contemporaneous understanding of the statute was to the contrary. In a formal and published explanation of the newly enacted 1962 legislation that President Kennedy had proposed, Attorney General Robert F. Kennedy compared Section 209 with Section 1914 and concluded that Section 209

> "uses much of the language of former 18 U.S.C. § 1914 and *does not vary from that statute in substance.*" *Memorandum Regarding Conflict of Interest Provisions of P.L. 87-849*, 28 Fed. Reg. 985, 988 (1963) (emphasis added).[17]

The Attorney General explained that Section 209, like old Section 1914, "prevents an *officer or employee* of the

[17] Excerpts from this *Memorandum* are set forth in Appendix E to this brief.

executive branch" from receiving any supplementary compensation for his federal service. *Id.* (emphasis added). This contemporaneous interpretation by the administration that proposed the legislation that became Section 209 surely is dispositive.[18]

5. Finally, in holding that the 1962 language change "indicates that payment need not occur during federal employment" (Pet. App. 6a), the Fourth Circuit undermined the overriding policy motivating the 1962 conflict-of-interest revisions. President Kennedy had explained that statutory revisions were needed to eliminate "wholly unnecessary obstacles to recruiting qualified people for Government service." *President's Message Relative to Ethical Conduct in the Government, supra*, at 1142.

Congressional supporters in turn explained that the principal purpose of the revisions was "to strike a more precise balance between the Government's interest in having faithful employees on the one hand and an unhampered source of valuable talent on the other." 108 Cong. Rec. S21990 (Oct. 3, 1962) (remarks of Sen. Hruska). Indeed, it is this very act of balancing two critical concerns that helps to explain why Congress decided that some of the conflict-of-interest statutes, such as Section 201 (bribery) and Section 203 (payments to members-elect of Congress) should reach pre-employment payments, while at the same time Congress left Section 209 appli-

[18] Courts, too, have recognized that Congress intended Section 209 to be limited to incumbent federal officials. In *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979), for example, the court held that, since the defendant was "on [annual] leave from his Government position" at the time he received the challenged payment, the requirement that the payments be made to compensate the recipient for services *as a government employee* "presents an insurmountable obstacle to conviction in this case." *Id.* at 969-970. Similarly, in *United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978), the court explicitly recognized that Section 209 only "prohibits (1) *an officer or employee* . . . of the United States" from receiving salary supplements "as compensation for services as an employee of the United States." *Id.* at 691-92 (emphasis added).

cable only to incumbent employees and officers of the United States. As Judge Hall recognized in his dissent, the Justice Department's present position "has tipped that balance and advanced a much more restrictive policy than Congress ever intended." Pet. App. 14a.

The Justice Department's current effort to apply Section 209 to private-sector severance payments inexplicably would make it even more difficult for the government to recruit qualified, high-level employees at a time when the government is facing a crisis in attracting such talent. As the Secretary of the Navy testified in support of the petitioners in this case, the recruitment of high-level officials for government positions involving special expertise is made very difficult by the financial losses that those candidates incur by leaving the private sector for government employment. JA 227-28. He explained that, because of this difficulty, "severance payments are a common occurrence when highly respected, highly expert, senior officers and employees of private-sector companies leave those positions in order to perform public service." JA 69, ¶ 5. This testimony not only is unrebutted in this case, but is confirmed by numerous reports in the public record.[19]

The Justice Department's position is particularly gratuitous, since it would impose a drastic prophylactic prohibition without any evidence of any underlying problem with private-sector severance payments. Indeed, it is highly significant that, despite the Justice Department's desire to pursue this case, the government was

[19] *See* Hudson Institute, *Civil Service 2000* (a study prepared for the U.S. Office of Personnel Management), at 29 (June 1988); *see also Report of the President's Commission on Compensation of Career Federal Executives*, at 30 (Feb. 1988).

The problem has also been widely reported in newspapers. *See, e.g.*, "U.S. Pay Levels Blamed As Key Jobs Go Unfilled," *Washington Post*, May 16, 1989, at A4, col. 5 ("a Defense Department official said that 24 individuals had been 'sounded out' for the job of undersecretary for acquisition, without a single taker").

forced to concede below that no officer or employee of the Department of Defense concluded that, as a result of petitioners' acceptance of severance payments from Boeing, any of the petitioners had engaged in a "conflict of interest situation" or created any "breach of the fiduciary duty of undivided loyalty" owed to the United States during government employment. JA 35, ¶ 103; 608-09.

Federal personnel and ethics questions are matters of great sensitivity where even small changes in the "rules of the game" can have disastrous consequences for the government.[20] As their distinguished careers in public service illustrate, these petitioners would not suggest that purely pragmatic concerns should excuse illegal or unethical conduct. It is up to Congress and the President, however, not the Justice Department, to decide whether some compelling public policy justifies creating another deterrent to public service by making it a crime for private-sector employees to receive severance payments

[20] A recent incident illustrates the difficulty of these questions. In November 1988, Congress enacted certain "ethics" provisions aimed at limiting employment opportunities *after* federal service. *See* Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, 102 Stat. 4055. The prospect of these new restrictions caused so many senior and essential federal officials to resign that Congress was forced to delay the law's effective date so that it could further study the issue. *See* "Congress Grants Bush Request for Delay on New Ethics Rules," *Washington Post*, May 16, 1989, at A1, col. 4; "House, Like Senate, Votes to Delay Ethics Law," *New York Times*, May 16, 1989, at 19, col. 1. This incident underscores that the delicate balance inherent in any "ethics" law can be made only after careful study of the political, personnel, and economic consequences.

As President Reagan noted last year when he vetoed the "Post-Employment Restrictions Act of 1988," H.R. 5043, 100th Cong., 2d Sess., "[i]t is already difficult to recruit talented people into the senior ranks of Government," and increasing deterrents to public service would mean that "[m]any of the most talented might never sign up to serve their country, and the country would be the worse for it." *President's Memorandum of Disapproval*, 24 Weekly Comp. Pres. Doc. 1561 (Nov. 23, 1988).

from their employers before they enter public service. Since Congress has not plainly outlawed pre-employment severance payments of the type petitioners received, the Court should not strain to construe Section 209 as doing so.

B. Under Federal Employment Law, Candidates For Federal Employment Do Not Acquire Obligations Or Rights As Federal Employees Until They Take The Employment Oath And Actually Enter On Duty.

In addition to twisting the language, legislative history, and fundamental purpose of Section 209, the effort to apply Section 209 to payments received before beginning federal employment would stretch beyond recognition the fundamental principles of agency law and federal employment law that underlie the government's common law claim in this case.

1. The government's complaint alleged that acceptance of these severance payments violated the "fiduciary duty of undivided loyalty" that all federal employees owe to their government employer. *See, e.g.*, JA 7, ¶ 1; Appellant's Br. at 2, 11; Brief in Opposition to Petition for Writ of Certiorari at 10. That theory, however, rested on a defective premise, since the petitioners were not federal employees when they received their severance payments and thus owed *no* fiduciary duty to the government.

The creation of an employer-employee relationship with the federal government is strictly governed by federal statutes. *McCarley v. Merit Systems Protection Board*, 757 F.2d 278, 280 (Fed. Cir. 1985). Two statutes set forth the elements of the federal employment relationship: 5 U.S.C. §§ 2104 (officers) and 2105 (employees). The statutes establish a three-part test for determining whether a person is an officer or employee of the United States. A federal employee is one who is

> "(1) *appointed* in the civil service by [an authorized individual];

> (2) *engaged in the performance of a Federal function* under authority of law or an Executive act; and
>
> (3) *subject to the supervision* of [an authorized individual] while engaged in the performance of the duties of his position." 5 U.S.C. § 2105(a) (1977 and Supp. 1989) (emphasis added). *See also* 5 U.S.C. § 2104(a) (federal officers).

The federal courts have held unequivocally that to obtain "the statutory protection due" from federal employment, a person "must come within the definition" of officer or employee set forth in these statutes. *National Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 (D.C. Cir. 1981).

There are no common law or equitable exceptions, as the Reagan hiring freeze cases vividly demonstrate. *See, e.g., National Treasury Employees Union, supra*, 663 F.2d at 246; *Pratte v. NLRB*, 683 F.2d 1038 (7th Cir. 1982). The courts have consistently rejected claims to the rights and benefits of federal employment, such as salary, retirement pay, and health benefits, even when the person has been formally appointed to a federal position and even arrived for the first day of work at his or her new job. This is so because "[t]here are three elements to the statute and *all* must be complied with to achieve the status of an employee." *McCarley v. Merit Systems Protection Board, supra*, 757 F.2d at 280 (citations omitted) (emphasis added). *See also Miller v. Merit Systems Protection Board*, 794 F.2d 660 (Fed. Cir.), *cert. denied*, 479 U.S. 886 (1986); *National Treasury Employees Union, supra*, 663 F.2d at 246; *Baker v. United States*, 614 F.2d 263, 266 (Ct. Cl. 1980). Therefore, "[o]ne may be an appointee and never achieve the status of an employee." *McCarley v. Merit Systems Protection Board, supra*, 757 F.2d at 280.

When they received their severance payments from their long-time private employer, the petitioners were still employed by Boeing. Pet. App. 18a, ¶ 16. None of

the petitioners had even received a formal *offer* of government employment, since necessary qualification screenings, security clearances, and political approvals had not yet been obtained. *See* JA 589-90, 592-95, 597-606; *see also* JA 26, ¶ 26; 28, ¶ 43; 31-32, ¶ 75; 165-66. Thus, as the trial judge correctly found on the basis of the testimony of a government-designated personnel expert, none of the individual petitioners was an officer or employee of the federal government at the time he received his severance payment. Pet. App. 17a-18a, ¶¶ 10-16. In fact, the government stipulated that, at the time, these men had no right to any federal employment nor had the government assumed any obligation to them. JA 26, ¶ 26; 28, ¶ 43; 29, ¶ 57; 31-32, ¶ 75; 33-34, ¶ 90.

2. The government has steadfastly chosen to refrain from treating candidates in petitioners' situation as government officers or employees while they are simply being considered for possible federal employment. It firmly insists that the government has *no* statutory, contractual, or common law obligation to mere candidates for federal positions. It is nothing short of duplicitous, therefore, for the government to claim in this case that a relationship existed at the time the payments were made that imposed "fiduciary" principal-agent or employer-employee duties on any of these men vis-à-vis the government. By the government's own choice, their mere candidacy for federal employment did not produce the binding, *reciprocal* obligation that underlies all agency relationships, including employment relationships.

In the absence of an agency or employment relationship, there can be no fiduciary duty of undivided loyalty. *See Restatement (Second) of Agency*, § 171 (1958); *Southern Pacific Transport Co. v. Continental Shippers Association*, 642 F.2d 236, 238 (8th Cir. 1981). *See also Whisper Soft Mills, Inc. v. NLRB*, 754, F.2d 1381, 1387 (9th Cir. 1984), *modified*, 118 L.R.R.M. (BNA) 3022

(9th Cir. 1985). A person cannot be an employee without an employer, a servant without a master, or an agent without a principal. Yet, at the time these men acted, the government had carefully disclaimed the role of employer, master, or principal.

The government's novel theory in this case—that a *prospective* federal employee (along with his current private employer) owes a fiduciary duty of "undivided loyalty" to the government even when the government has no corresponding duties or obligations to the employee—has no basis in the law of agency or the federal common law. *E.g.*, *Restatement (Second) of Agency*, §§ 376, 377 (1958). As the trial judge found, the critical predicate for a claim for breach of fiduciary duty is lacking in this case.

> "Because they were not government employees, the individual defendants owed no fiduciary or other duty to the United States government at the time of the severance payments. *See* [*Restatement (Second) of Agency*, § 387 (1958)]. In accepting those payments, the individuals therefore breached no common law or other duty owed to the United States government . . . ." Pet. App. 23a.

Indeed, in apparent recognition of these basic agency principles, the government has never before attempted to bring a case alleging a breach of fiduciary duty when the challenged act occurred prior to the person's entering government service.[21]

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[21] The government has brought suit alleging a breach of fiduciary duty under federal common law only where the act that constituted the breach occurred *after* the person had entered into government employment and the activities or relationships were inconsistent with performing simultaneous federal service. *See, e.g., United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Kearns*, 595 F.2d 729, 731 (D.C. Cir. 1978); *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964); *United States v. Douglas*, 626 F. Supp. 621 (E.D. Va. 1985); *United States v. Pezzello*, 474 F. Supp. 462 (N.D. Tex. 1979); *United States v. King*, 469 F. Supp. 167 (D.S.C. 1979); *United States v.*

Moreover, any notion that some inchoate duty of fiduciary loyalty arose at some unspecified time before the creation of the employment relationship is unworkable. If the government's theory were correct, a prospective federal employee would somehow have a fiduciary duty of "undivided" loyalty *both* to his present private employer *and* to the government as a potential employer. That theory of Janus-like obligation is a logical, legal, and ethical impossibility.

II. PETITIONERS' DISCLOSURE OF THEIR SEVERANCE PAYMENTS FORECLOSES A "QUASI CONTRACT" CLAIM FOR POTENTIAL BREACH OF FIDUCIARY DUTY.

Even if petitioners' acceptance of severance payments from Boeing raised what the government vaguely alleged in its complaint was a "conflict of interest situation," (JA 7, ¶ 1), the disclosure of that financial relationship to proper authorities dissipated the "potential" conflict and foreclosed a claim for damages. Under common law principles, an employee's timely disclosure of a financial relationship with a third party obviates any potential conflict of interest and protects the employee from liability based on that relationship.

A. Under Federal Common Law Principles Applicable To This Civil Action, Disclosure Of A Relationship With A Third Party Negates Any Potential Conflict Of Interest.

1. The government chose to bring this suit as a civil action for breach of fiduciary duty under federal common law, claiming a "quasi contract" right to the severance payments the individual petitioners had received and retained. This case is governed, therefore, by federal common law principles applicable to the relationship between the federal government and its employees. *See United States v. Kearns, supra*, 595 F.2d at 734.

Podell, 436 F. Supp. 1039 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 31 (2d Cir. 1978).

Cases in which a court has found that a federal employee's outside financial relationship breached his fiduciary duty uniformly involve *secret* payments to the employee that endanger the employer's interests vis-à-vis the undisclosed benefactor. *See, e.g., Continental Management, Inc. v. United States*, 527 F.2d 613, 617 (Ct. Cl. 1975). As one court succinctly put it, a "conflict of interest must be undisclosed to constitute a breach of duty to the principal." *Kearns, supra*, 595 F.2d at 734, *citing United States v. Carter*, 217 U.S. 286, 305 (1910); *see United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Drumm, supra*, 329 F.2d at 113; *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969).

The Fourth Circuit itself acknowledged that "under the common law, only secret profits present a conflict." Pet. App. 8a, *citing Kenealy, supra*, 646 F.2d at 704-05. The rationale is clear: when the employer is aware of the employee's relationship with the third party, the employer can take adequate steps to assure that the relationship does not advance the outsider's interests at the expense of the employer's. Thus, the government conceded in this case that, under established fiduciary duty principles, adequate disclosure of a financial relationship that might otherwise create a potential conflict of interest can obviate such a potential conflict and negate any liability. Appellant's Br. at 43-45. This approach is consistent with principles of agency law developed in the state courts.[22]

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[22] While federal precedent provides the primary legal basis for any claim the government is attempting to assert, "in appropriate circumstances we may look to State and other common law sources for guidance." *Kearns, supra*, 595 F.2d at 733, *citing United States v. Clearfield Trust Co.*, 318 U.S. 363, 367 (1943). State law clearly recognizes disclosure of an outside relationship as satisfying any fiduciary duty of loyalty. *See, e.g., Bell v. Routh Robbins Real Estate Corp.*, 206 Va. 853, 147 S.E.2d 277 (Va. 1966); *Metro Realty of Tidewater, Inc. v. Woolard*, 223 Va. 92, 286 S.E.2d 197

2. The court of appeals held, however, as the government has argued, that petitioners' disclosures in this case were irrelevant because this action "is based on a violation of the standards of § 209." Pet. App. 8a. This assertion misapprehends the nature of this lawsuit. The government did not bring this case directly under 18 U.S.C. § 209, since that criminal statute provides no civil cause of action. Rather, the government declared below that it was bringing a civil claim to recover "at common law" for damages arising out of an alleged "breach of the fiduciary duty of undivided loyalty" and that the case is controlled by federal common law principles. JA 7, ¶ 1; 123-29. Indeed, the first sentence of *each* of the government's counts against the defendants alleges that this is "an action brought . . . at common law." *See* JA 7, ¶ 1; 13, ¶ 17; 14, ¶ 22; 16, ¶ 27; 19, ¶ 37. The government merely "invoked" Section 209 to define the type of fiduciary duty that petitioners were alleged to have breached.

At the same time, however, the government has ignored applicable regulations that also serve to define any fiduciary duty and set forth methods of disclosure to avoid potential breaches in accordance with common law principles. The government cannot have it both ways. The government cannot rely on federal common law principles as the predicate for a civil claim that is not authorized by statute, and at the same time force the Court to blind itself to cognate common law principles that nullify the "potential" conflict and any consequent liability.

(Va. 1982) (Virginia law); *Coldwell Banker Commercial Group, Inc. v. Nodvin*, 598 F. Supp. 853, 858 (N.D. Ga. 1984), *aff'd*, 774 F.2d 1177 (11th Cir. 1985) (Georgia law); *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 548 (E.D. Mich. 1984), *aff'd in part, rev'd in part*, 767 F.2d 919 (6th Cir. 1985) (Kansas law); *Restatement (Second) of Agency*, § 388 (1958).

B. Petitioners' Disclosure In This Case Was Sufficient To Foreclose Liability.

The Fourth Circuit, at the government's urging, held that if "secrecy or nondisclosure was an element here," petitioners' "disclosures . . . of total income from Boeing, combining salary and the severance payments in one figure, reported on financial disclosure forms" were "not sufficiently complete to insulate the payments from the conflict of interest laws." Pet. App. at 8a. This view, too, cannot be squared with applicable law.

1. In *United States v. Kenealy*, *supra*, the government pursued a civil action to recover profits obtained by a federal employee through self-dealing. The government argued that common law principles apply to any alleged breach of fiduciary duty, and that "statutes *and regulations* provide evidence of the precise nature of this fiduciary duty." *Kenealy*, *supra*, 646 F.2d at 703 (emphasis added), *citing United States v. Podell*, *supra*, 436 F. Supp. at 1042. The court in *Kenealy* agreed that disclosures "must be evaluated against the regulations that provide evidence of the extent of the fiduciary duty" and also define the standard of disclosure which must be met. 646 F.2d at 704.

Unlike the situation in 1961 in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 540 (1961)—when the Court held that disclosure could not cure the breach of a statutory ethics rule because Congress had not authorized anyone to waive the statutory conflict—Congress in the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. App. §§ 201 *et seq.*), empowered agencies to promulgate disclosure regulations and thus to elicit information about potential conflicts.[23] Congress also authorized govern-

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[23] Indeed, in *Mississippi Valley*, this Court implied that, while disclosure there of a potential conflict of interest to an immediate superior did not necessarily obviate that conflict (because the superior might share the conflict), disclosure of the conflict to the

ment ethics officers to review certain disclosed *potential* conflicts of interest and determine that they involve no *actual* conflict. Moreover, the disclosure requirements and other restraints put in place by Congress in the Ethics in Government Act are designed to prevent the situation that the Court feared in *Mississippi Valley*, namely, a case where "the superiors might, in fact, share the agent's conflict of interest." 364 U.S. at 561. This case, of course, involves only an alleged potential conflict of interest; there has been no allegation of an actual conflict.

Here, petitioners complied with all applicable disclosure regulations.[24] As required by 5 CFR §§ 734.201 and 734.202, they completed the DoD's SF 278 Financial Disclosure Forms.[25] This form is the principal financial disclosure tool utilized by the government to detect potential and actual conflicts of interests. The government's instructions for completing the SF 278 Form *require* the reporting employee to *aggregate* all forms of earned and non-investment income from a single source. *See* 5 C.F.R. § 734.301; *see also* 32 CFR § 40.10(b)

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proper authorities might well have negated any conflict. 364 U.S. at 561.

[24] Shortly after passage of the Ethics in Government Act, ethics regulations applicable to all federal agencies (including DoD) were promulgated, including 5 CFR Parts 734, 735 and 738. These regulations were in effect in 1981-82, and remain in effect today (with relatively minor amendments immaterial to this case). They are cited in this brief in their current form.

In 1977, the Defense Department promulgated supplementary ethics regulations, which also were in effect in 1981-82 and which are cited herein as 32 CFR Part 40 (1977). The Defense Department substantially amended these regulations in 1987. The current regulations are cited herein as 32 CFR Part 40 (1988). The 1987 amendments reflect the structure of the Act and the general ethics regulations contained in the parts of Title 5 CFR mentioned above.

[25] The regulations did not require Crandon to fill out such a form, as he was entering the government as a GS-15 level employee. *See* 5 CFR § 734.202(c). *See also* 32 CFR §§ 40.6(c)(2)(i)(D), 40.10 (1988).

(1988).[26] As required by the instructions, petitioners aggregated the severance payments along with salary and other income from Boeing, and thus accurately revealed the size of their financial relationships with Boeing.

The government does not dispute that petitioners completed their SF 278 Forms in accordance with the government's own instructions. Indeed, the Defense Department General Counsel's office formally acknowledged in testimony before Congress in commenting on *this* case that the government's reporting procedures have "no requirement for segregating payments from employers into those that are severance payments and those that are part of regular compensation." JA 611. Here again, the rationale behind the governing regulation is clear: what is a matter of possible concern to the government and to the public is the existence and extent of a financial relationship between a federal official and a private company. Before the Justice Department filed this complaint, the government never considered pertinent the precise components that made up the accurately disclosed total payments.

Moreover, following the admonition of the regulations, the petitioners sought further guidance from government counsel and followed the advice they received.[27] Jones,

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[26] The explanatory preamble to 5 CFR Part 734 (Executive Personnel Financial Disclosure Requirements) explicitly states that "guidance as to the requirements for financial disclosure report preparation by reporting individuals is contained in the instructions which accompany the report form (SF 278)." 45 Fed. Reg. 69776, 69777 (Oct. 21, 1980).

[27] DoD regulations in effect in 1981 and 1982 required DoD personnel to "consult legal counsel" or ethics counselors "[i]n cases of doubt as to the propriety of a proposed action," 32 CFR § 40.4(d) (1977), and made "designated standards of conduct counselors" responsible for providing "advice regarding all standards of conduct problems." 32 CFR § 40.16(a) (1977). Current regulations state that "[a]dditional guidance for personnel in covered positions is available" from designated agency ethics officers. 32 CFR § 40.10(b) (1988). *See also* 5 CFR §§ 735.105, 738.201, 738.202(b), and 738.203.

for example, discussed with an attorney in the Defense Department's Office of the General Counsel—which has supervisory authority over DoD ethics officials, *see* 32 CFR § 40.16(b) (1977); 32 CFR § 40.5(c) (1988)—the proper manner for reporting his severance payment. Jones was specifically advised to aggregate the severance payment with his other Boeing income. JA 213; 471-73. Paisley also obtained similar advice from an attorney in the General Counsel's Office of the Department of the Navy. JA 173-74.

Designated agency ethics officials then approved the completed forms, certifying that the "information contained in this report discloses no conflict of interest under applicable laws and regulations." *See, e.g.*, LE Exs. 3, 22, 23, 24, 25. *See* 5 U.S.C. App. § 206(b)(1); 5 CFR § 734.604(b); *see also* 32 CFR § 40.10(c)(3) (1988).[28] According to applicable regulations, "the designated agency ethics official shall ensure that . . . [a]ll financial disclosure reports . . . are properly maintained and effectively and consistently *reviewed for conformance with all applicable laws and statutes.*" 5 CFR § 738.203(b)(4) (emphasis added).[29]

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[28] DAEOs have the definitive responsibility for identifying and remedying potential conflicts of interest of incumbent or prospective DoD employees. *See* 5 CFR § 738.201; 32 CFR §§ 40.5(b)(3), 40.5(b)(8), 40.10 (1988).

[29] In the Ethics in Government Act, Congress instructed the director of the Office of Government Ethics to ensure that each federal agency's procedures concerning the collection, review, and evaluation of financial disclosure statements like SF 278 "are in conformance with all applicable requirements, whether established by law, regulation, or Executive order." 5 U.S.C. App. § 402(d). The Defense Department's ethics and disclosure regulations expressly note applicable conflict-of-interest statutes, including 18 U.S.C. § 209, and specifically require DAEOs to review SF 278 reports for possible violations of Chapter 1 of Title 18 of the U.S. Code—the chapter that contains Section 209. 32 CFR §§ 40.10(c)(3)(i), 40.7(a) (1988). Further, those department regulations were implemented pursuant to authority which provides

Furthermore, the DAEOs are required to remedy inadequacies in the information provided by notifying the reporting employee and requesting additional information. 5 U.S.C. App. § 206(b)(2); 5 CFR § 734.604(b)(2); 32 CFR § 40.10(c)(3)(iii) (1988).[30] In this case, the DAEOs gave no such notification and made no request for additional information. Despite the government's current theory about what made these severance payments illegal, the DAEOs never inquired if the petitioners knew how Boeing calculated the severance payments.

The regulations also make the DAEOs responsible for ensuring that "[p]rompt and effective action including administrative action is undertaken to remedy . . . [p]otential or actual conflicts of interests, or appearances thereof, which were disclosed on a financial disclosure report." 5 CFR § 738.203(b)(9)(iii); *see also* 32 CFR § 40.5(b) (1988). As the district court found, however, "[at] no time has the Department of Defense taken any disciplinary or other adverse action against any of the individual defendants, although it has had actual knowledge of their previous employment by Boeing and their receipt of a severance payment from Boeing," including, since 1982, the factors Boeing considered in deciding the

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that such regulations shall "[i]mplement the requirements of law" and shall "[p]rescribe additional standards of ethical and other conduct and reporting requirements that . . . are not inconsistent with law, the Executive order [11222], and this part." 5 CFR § 735.104(a). Earlier DoD reporting procedures, which were later consolidated into 32 CFR Part 40, also required submitted information to be reviewed for the possibility of a violation of law. 35 Fed. Reg. 18040, 18041 (Nov. 25, 1970). *See also* 32 CFR § 40.4(b) (1977). In short, the regulations governing disclosure of potential conflicts of interest were drafted with specific statutory prohibitions such as Section 209 in mind.

[30] Similarly, the earlier version of 32 CFR Part 40 provided that "DoD personnel who have information which causes them to believe other DoD personnel have violated a statute or standard of conduct imposed by this Part should first bring the matter to the attention of those persons." 32 CFR § 40.17 (1977).

appropriate size of the payments. Pet. App. 19a-20a, ¶ 24. It is decisive that at all times the statutorily responsible officials have been satisfied that none of the petitioners breached his obligations to the government by accepting and retaining a properly disclosed severance payment.

2. In addition, the Fourth Circuit inexplicably chose to overlook the fact that, as the district court found, at least two petitioners had specifically disclosed "the fact and amount of the severance payments which they received from Boeing." Pet. App. 20a ¶26. Jones discussed the severance payments directly with his government superiors, Under Secretary of Defense DeLauer and Dr. DeLauer's executive assistant, Colonel Kenneth Hollander. *Id.* Indeed, Under Secretary DeLauer knew of the severance payments from the beginning and concluded that Mr. Jones had properly disclosed it. *See* pp. 8-10 *supra.* At Jones' request, Colonel Hollander consulted the DoD's Office of General Counsel and received assurances that the proposed severance payment was legal. JA 210-11. Later, Jones disclosed the actual payment to an attorney in the Office of the General Counsel. JA 211-13, 471-72. Similarly, Paisley notified various officials of the DoD and the Senate about his severance payment and received assurances that it was permissible. These assurances came from Secretary of the Navy John Lehman (JA 172-75, 227-30), counsel from the Navy's Office of General Counsel (JA 172-74), and counsel for the Senate Armed Services Committee (JA 175-76). Both Jones and Paisley asked for and obtained these assurances *before* they accepted the payments. *See* pp. 8-9 *supra.*

3. The government further complains that petitioners' disclosures were insufficient because they did not disclose the fact that, in calculating the amount of the proposed severance payments, Boeing personnel department

employees may have considered, *inter alia*, the difference between petitioners' salaries at Boeing and their prospective government salaries. The unrebutted evidence, however, shows that petitioners did not know how Boeing calculated the payments or what factors Boeing actually considered. JA 47-48, ¶ 3; 188; 203-04; 492-94; 531-32.[31]

It defies reason to impose a requirement that a person disclose what he or she does not know. Perhaps most telling, however, is that none of the DoD officials charged with guarding against potential conflicts thought it was relevant how Boeing arrived at the severance payments, since they *never* raised that issue despite actual knowledge of the severance payments.

4. In any event, the government itself knew that Boeing officials may have considered salary differences, among other factors, in constructing a benchmark recommendation for a severance payment. Over the prior 20 years, Boeing had informed the Department of Defense in writing about the company's severance payment arrangements, including in at least one case the fact that the payments "were calculated with reference to the differential between the financial benefits that would accrue to the employee if he remained with Boeing, as compared with those that would accrue to the employee if he accepted the anticipated government position." Pet. App. 16a-17a, ¶ 7. At no time did the government object that consideration of those differences would make the prac-

[31] In addition, the trial judge credited the testimony from Boeing officials that the ultimate decision whether to make a severance payment and the appropriate amount was made by Boeing's chairman, who testified that he relied on his sense of the extent of the employee's contribution to the company. The chairman did not know of any factors used by the personnel department as benchmarks, including the difference between government salaries and Boeing salaries, and he ultimately ordered revisions to at least one of the amounts proposed by personnel officials who may have considered those differences. Pet. App. 19a, ¶ 20; JA 45-46, ¶ 7; 298-99; 329-31; 415.

tice a crime for both the company and the employees receiving the payments, yet the government continued to avail itself of the services of these former Boeing employees.

Moreover, in *this* case, during a routine audit of Boeing by the Defense Contract Audit Agency ("DCAA"), an agency within the DoD, Boeing provided the worksheets that the Boeing personnel department employees used in developing suggested severance payments for each of the petitioners. *See* LE Ex. 19. In late 1981 and early 1982, Boeing informed DCAA auditors about the payments and "the Company's historical practices of making severance payments and the basis for the severance payments to these individuals, including specifically the factors considered in arriving at the payment amount." Pet. App. 21a, ¶ 29. The district court found the DCAA was aware of the following information by February 1982, a few months after Jones, Paisley, and Reynolds took office:

> "that severance payments had been made to Messrs. Jones, Reynolds and Paisley; the amount of the payments; the government positions assumed by those individuals following their separation from Boeing; *the factors now alleged by the government to have been considered by Boeing* in arriving at the amount of the payment; and the method by which Boeing accounted for those payments pursuant to Armed Services Procurement Regulations 15-205.39." Pet. App. 21a, ¶ 30 (emphasis added).

The government thus knew all the allegedly relevant facts about these severance payments at about the same time or before (in the case of Kitson and Crandon) the petitioners began their federal employment. No duty of loyalty is violated where the principal knows of the relevant facts or acquiesces in the agent's conduct. *See Restatement (Second) of Agency*, § 392, comment b (1958).[32]

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[32] The government cannot claim that informing DCAA of the relevant facts is not sufficient disclosure. Both courts below held that, for purposes of the statute of limitations, knowledge by the DCAA constituted official knowledge by the government. Pet. App. 10a. The government has not sought certiorari to review that ruling.

5. Finally, in addition to their full disclosure, the petitioners took voluntary steps to avoid even the appearance of a possible conflict of interest. While employed by the government, none of the men was responsible for contracting or procurement decisions. Jones, Reynolds, Kitson, and Crandon participated in no DoD dealings with Boeing; as the trial court found, they specifically disqualified themselves from working on any Boeing-related matters. Pet. App. 20a, ¶ 27. *See* JA 584, 585, 587. Paisley also recused himself from any dealings with Boeing except for participation in a Boeing-related project at the express direction of his superior, Secretary Lehman. Pet. App. 20a, ¶ 27. Thus, the government can claim no actual injury from any "potential" conflict, even if it had not had full knowledge of everything it now argues made the severance payments illegal.

III. THE TRIAL COURT HAD AMPLE EVIDENCE TO SUPPORT THE FINDING THAT PETITIONERS DID NOT INTEND TO RECEIVE THEIR SEVERANCE PAYMENTS AS "COMPENSATION" FOR FUTURE FEDERAL SERVICE.

This Court has repeatedly admonished the courts of appeals that they may not retry issues of fact resolved at trial.[33] In the decision below, the Fourth Circuit reverted to substituting its impressions for the determinations of the fact-finder at trial, just as it did in *Bessemer City*.

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[33] *E.g., FERC v. Martin Exploration Management Co.*, —— U.S. ——, 100 L. Ed. 2d 238, 108 S. Ct. 1765 (1988); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Nichelson v. Quaker Oats Co.*, 472 U.S. 1004 (1985); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

A. Section 209 Requires That The Payor Or Recipient Specifically Intend The Payment To Be Compensation For Services Rendered To The Government.

1. There is no longer any dispute in this case that Section 209, like most criminal statutes, incorporates an intent requirement. Pet. App. 7a. Both the district court and the court of appeals agreed that Section 209 requires that defendants specifically "intend[] the payments to be compensation for their government services," Pet. App. 7a, and the government has not cross-petitioned on this issue.

The statute, on its face, penalizes only a federal employee who accepts a supplementary payment "as compensation for" performing federal services. In choosing those terms, Congress sought "to emphasize the intent that the prohibition is against private payment *made expressly* for services rendered to the Government." *House Report* at 24-25 (emphasis added). *See also* Staff of Subcomm. No. 5 of House Comm. on the Judiciary, *Federal Conflict of Interest Legislation*, 85th Cong., 2d Sess. (Comm. Print 1958), at 44 (recognizing that under former 18 U.S.C. § 1914, the determination of "[w]hether the services 'for' or 'in connection with' which a payment is made are Government services . . . involves subjective intent"). Indeed, on July 21, 1982, the Justice Department publicly announced that Attorney General William French Smith had not violated Section 209 when he accepted a $50,000 severance payment upon resigning from a corporate board to become Attorney General, because there was "no basis to conclude that Mr. Smith *accepted the payment with the understanding* that it was supplementing" his government salary. JA 86, 91 (emphasis added).

2. Section 209(a) actually defines two separate offenses, with two separate intent requirements. The first paragraph subjects to criminal penalties a person who "receives any salary . . . or supplementation of salary, as compensation for his services as an officer or em-

ployee of the executive branch of the United States Government . . . ." Under this section, as the Justice Department acknowledged in the Smith matter, the recipient must *understand* that he is receiving the payment "as compensation for his services" as an employee of the United States. 18 U.S.C. § 209(a). The second paragraph subjects to the same penalties one who "makes" such a prohibited payment to "any such officer or employee"— the requisite intent here being that the payor intend the payment "as compensation" for the recipient's "services as an officer or employee" of the United States. *Id.*[34]

In a case against both the payor and payee of an alleged salary supplement, therefore, the court must examine two separate "intents"—that of the payor and that of the recipient. The circuit courts have recognized that "the donee's intent may differ from the donor's." *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978). *Accord United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *United States v. Miller*, 340 F.2d 421, 424 (4th Cir. 1965).

B. The Evidence Supported The Trial Court's Finding That Petitioners Lacked The Requisite Intent.

1. In this case, the trial judge found—after a full trial at which he heard live testimony and received hundreds of exhibits—that Boeing did not *make* any of the five payments with the requisite compensatory intent. Pet. App. 24a-25a. The Fourth Circuit overturned that find-

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[34] The Fourth Circuit recognized that Section 209(a) defines two different offenses. *See* Pet. App. 9a-10a (characterizing Boeing's making of the severance payment as a tort subject to a three-year limitations period, yet characterizing the individuals' alleged violation of the statute by receiving the payments as "contractual in nature" and subject to a six-year limitations period).

ing, purportedly as being "clearly erroneous." Pet. App. 7a.[35]

The trial judge also had separately found that the individual petitioners lacked the knowledge or intent required to breach Section 209. "The individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries." Pet. App. 19a, ¶ 22. The trial judge also concluded that "the severance payments were not accepted by the individual defendants as a supplementation to their government salaries or as compensation for their government services." Pet. App. 24a-25a. Rather, as the trial judge specifically found, the "severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing"—the extensive accrued but unvested benefits that they had accumulated and described in their submission to Boeing. Pet. App. 20a, ¶ 25. The judge found that the payments were made "to sever the relationship with these employees *based on past performance* and accumulated benefits." Pet. App. 25a (emphasis added).

Despite these specific findings, the court of appeals imposed liability on the individuals. It did so, however, without ever addressing the distinct issue whether the employees had the requisite intent in *receiving* the payments. In his dissenting opinion (Pet. App. 12a-14a), Judge Hall emphasized that the majority never came to grips with the trial court's express findings that the individual Boeing employees lacked the intent necessary to violate Section 209(a). As Judge Hall noted, the trier of fact, "after hearing substantial testimony and weighing

[35] In its brief on the merits, Boeing contends that the panel did not legitimately apply the "clearly erroneous" standard of review, but rather made its own *de novo* assessment of the evidence regarding Boeing's intent. The individual petitioners agree, and refer the Court to Boeing's brief on that issue.

the credibility of numerous witnesses" (Pet. App. 12a), specifically found that the "individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries." Pet. App. 19a, ¶ 22.

2. If the court below had addressed the employees' intent in receiving the payments, it could not have overturned the trial court's findings as clearly erroneous. A finding concerning knowledge and intent is, of course, a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). As such, the finding must be upheld on appeal if "the district court's account of the evidence is plausible in light of the record viewed in its entirety," even if the appellate court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bessemer City, supra*, 470 U.S. at 574. Moreover, Fed. R. Civ. P. 52(a) demands "even greater deference to the trial court's findings" that depend, as Judge Hall emphasized here in dissent, on the trial judge's "determinations regarding the credibility of witnesses." *Bessemer City, supra*, 470 U.S. at 575. *See* Pet. App. 12a.

The record fully supports the trial judge's findings that the individual petitioners lacked the requisite intent to violate Section 209. The judge made his factual findings, only after considering the unrebutted evidence presented both in live testimony at trial and in deposition and affidavit testimony admitted into evidence, that the employees understood that the severance payments were intended to liquidate their financial connections with Boeing and reward them for many years of distinguished past service to the company, not to "compensate" them for the government service they hoped to render if they actually obtained their proposed government positions. JA 47-48, ¶ 3 (Crandon); 77-78, ¶¶ 15-19 (Reynolds); 172, 185-86 (Paisley); 204-05 (Jones); 236 (Kitson).

Thus, for example, Jones testified about his understanding concerning the purpose of the severance payment:

> "They [Boeing] said that that [the severance payment] was to, intended to liquidate all my interest in the company, financial and otherwise, and to sever all my financial ties, and to avoid any conflict of interest that might result from retained financial ties.
>
> Q. Was it your understanding that the payment being paid to you was to compensate you for performing service to the government apart from anything being said to you?
>
> A. No, my understanding was quite the contrary to that." JA 204-05.

Moreover, each of the petitioners testified—without contradiction—that he had *never* been told by Boeing, and had *never* learned in any other way, what factors Boeing took into account in calculating his severance payment. JA 187-88, 203-04. *See also* JA 47-48, ¶ 3; 77, ¶ 12; 482, 494, 509, 515, 531-32.[36] Indeed, the trial judge had before him overwhelming evidence that all the employees knew was that each had submitted financial statements to Boeing listing numerous factors reflecting the overall financial impact of leaving Boeing at that stage of his career, including forfeiture of accrued but unvested matching contributions to Boeing's Voluntary Investment Plan, forfeiture of accrued but unmatured stock options, loss of vacation benefits and sick leave, and diminished or forfeited retirement benefits. *See, e.g.*, JA 169-70; 205-07; 490; *see also* pp. 4-6 *supra*.

Moreover, the record is replete with objective evidence that further bolsters the trial judge's factual finding

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[36] *See, e.g.*, Jones' testimony that "[t]he amount of severance pay that I received was not equal to any individual figure in my estimate, nor could I duplicate that figure by combining any of those estimates." JA 482.

that the individual petitioners did not receive the severance payments "as compensation for" prospective government service. Each person received his payment from Boeing at a time when he was not a government employee—or even an appointee—and had no enforceable right to potential government office. Pet. App. 17a-18a; JA 26, ¶ 26; 28, ¶ 43; 29, ¶ 57; 31-32, ¶ 75; 33-34, ¶ 90; 589-90; 592-95; 597-603; 603-06; *see also* p. 7 *supra*. Both the documentary exhibits and the unrebutted testimony show that each payment was fixed, final, and irrevocable, and was not contingent upon entry into government service, length of time spent in government employ, or variations in government salary. Pet. App. 18a, ¶ 17; *see also* JA 48, ¶ 4; 77, ¶ 15; 172-73; 186; 210; 522; 539-40. The very character of those payments, therefore, belies the inference that the employees must have viewed the payments from their private-sector employer as "compensating" them for government service that they might—or might not—render in the future.

3. Completely ignoring the trial court's findings and this mass of evidence, and based solely on its conclusion that *Boeing* must have intended to "compensate" its employees for future service as government employees—because some Boeing personnel department members might have considered salary differences as *a* factor in determining the proposed *amounts* of the payments—the panel found these reputable public servants liable for violating standards contained in a criminal statute. When the trier of fact looked them in the eye as they testified, however, and found their amply grounded explanation to be true, the appellate court had no license to assume (or even implicitly to "find") exactly the contrary. *See, e.g., Bessemer City, supra*, 470 U.S. 564.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand with instructions to reinstate the judgment of the district court.

Respectfully submitted,

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June 1989.

APPENDICES

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APPENDIX A

18 U.S.C. § 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

• • • •

Former 18 U.S.C. § 1914. Salary of government officials and employees payable only by United States

Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States—

Shall be fined not more than $1,000 or imprisoned not more than six months, or both.

APPENDIX B

87th Congress *2d Session* | SENATE | Report No. 2213

STRENGTHENING THE CRIMINAL LAWS RELATING TO BRIBERY, GRAFT, AND CONFLICTS OF INTEREST, AND FOR OTHER PURPOSES

SEPTEMBER 29, 1962.—Ordered to be printed

Mr. HRUSKA (for Mr. EASTLAND), from the Committee on the Judiciary, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany H.R. 8140]

The Committtee on the Judiciary, to which was referred the bill (H.R. 8140) to strengthen the criminal laws relating to bribery, graft, and conflicts of interest, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended do pass.

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PURPOSE

This legislation is concerned with two subjects, conflicts of interest and bribery, and would revise the current criminal statutes dealing with these subjects.

Insofar as the conflict-of-interest laws are concerned, the bill has two purposes. First, it would simplify and strengthen the conflict laws presently in effect. Second, in the interests of facilitating the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis, it would limit the impact of those laws on the persons so employed without depriving the Government of protection against unethical conduct on their part.

A secondary feature of the bill is the substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts.

LEGISLATIVE HISTORY

On April 27, 1961, the President transmitted to the Congress a special message dealing with conflicts of interest and ethical behavior on the part of persons serving in the departments and agencies of the Government. Accompanying the message was a proposed bill to revise the conflict-of-interest laws which was later introduced as H.R. 7139. Two identical bills, H.R. 3411 and H.R. 3412, introduced by the chairman and the ranking minority members of the House Committee on the Judiciary, and H.R. 3050, a bill drafted by the Association of the Bar of the City of New York, also proposed significant changes in the conflict of interest laws. H.R. 3411 and H.R. 3412, in addition, contained provisions designed to consolidate the bribery laws. Hearings on the four bills were held June 1 and 2, 1961, by the Antitrust Subcommittee of the House Committee on the Judiciary. The subcommittee subsequently combined various features of these bills into a new bill, H.R. 8140, which received the support of the administration, the Association of the Bar

of the City of New York, and other groups. Following approval by the full committee, H.R. 8140 passed the House on August 7, 1961.

This committee held hearings on the bill on June 21, 1962. Although the committee received a number of recommendations for amendment, all witnesses agreed with the objectives of the bill and unhesitatingly supported its enactment.

STATEMENT

The necessity for maintaining high ethical standards of behavior in the Government becomes greater as its activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy. The best means of assuring high standards have been a matter of increasing concern in recent years, as evidenced by the work of various committees of the Congress, the executive branch, members of the bar, and others. All of these groups have found that the present laws, while correct in principle, are confusing and inadequate and to a considerable degree are actually a hindrance to the Government. This committee has come to the same conclusion. The consensus of views in this connection is reflected in the following passage from the President's special message of April 21, 1961:

> Five of these statutes were enacted before 1873. Each was enacted without coordination with any of the others. No two of them use uniform terminology. All but one impose criminal penalties. There is both overlap and inconsistency. Every study of these laws has concluded that, while sound in principle, they are grossly deficient in form and substance.
>
> The fundamental defect of these statutes as presently written is that: On the one hand, they permit an astonishing range of private interests and activities by public officials which are wholly incompatible with the duties of public office, on the other hand,

they create wholly unnecessary obstacles to recruiting qualified people for government service. This latter deficiency is particularly serious in the case of consultants and other temporary employees, and has been repeatedly recognized by Congress in its enactment of special exemption statutes.

A serious defect of the statutes arise from the fact that, as construed in *United States* v. *Bergson* (119 F. Supp. 459 (D.C.D.C., 1954)), they prevent improper activities by present and former Government employees in connection with claims to money or property but do not protect the Government against the same kind of activities when directed to proceedings which are not technically for money or property. Yet the dangers of abuse of Government position and of the unconscionable use of inside information against the Government by a present or former employee are, of course, as great in an administrative or judicial proceeding for the award of a valuable license or other privilege as in a proceeding to obtain the payment of money.

An example of overprotection of the Government's interest, as contrasted with the underprotection just described, is found in title 5, United States Code, section 99, a statute applying to a former employee of an executive department. It prevents him for 2 years after the end of his employment with that department from prosecuting a claim which was pending, during the period of his incumbency, either in that or in any other department, even though he was totally unaware of the claim during that period. Whatever the merit of this prohibition at a time when the Government departments were fewer in number and much smaller in size, it makes very little sense today. Thus, it is hard to advance a reasonable justification for precluding a former Commerce Department attorney, for 2 years or for any length of time, from representing before the Treasury Department a private client who has a claim for an income tax refund

with which the attorney never had any connection while in Government service.

In considering the application of present law in relation to the Government's utilization of temporary or intermittent consultants and advisers, it must be emphasized that most of the existing conflict-of-interest statutes were enacted in the 19th century—that is, at a time when persons outside the Government rarely served it in this way. The laws were therefore directed at activities of regular Government employees, and their present impact on the occasionally needed experts—those whose main work is performed outside the Government—is unduly severe. This harsh impact constitutes an appreciable deterrent to the Government's obtaining needed part-time services.

The problem was well stated by the Senate Government Operations Subcommittee on National Policy Machinery in a study dated February 28, 1961, and entitled "Organizing for National Security—the Private Citizen and the National Service":

> The heart of the difficulty lies in the failure of present-day law to recognize the special problems of the occasional consultant. * * *
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> To be sure, consultancies can in certain conditions be abused by those who would pursue private gain or seek to exert covert and wrongful influence on Government policies. The law and administrative regulations should effectively guard against such abuses. Indeed, we require more precise and sophisticated safeguards than exist presently.
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> But the statutes should be refined to deal with the real danger. The intermittent consultant should not be arbitrarily and indiscriminately swept under a network of outdated general restraints serving only to deny the Government the expert assistance it needs in modern conditions.

An Advisory Panel on Ethics and Conflict of Interest in Government, appointed by the President in January 1961, also considered the problem. This panel, composed of retired Judge Calvert Magruder, of the U.S. Court of Appeals for the First Circuit; Dean Jefferson B. Fordham, of the University of Pennsylvania Law School, and Prof. Bayless Manning, of the Yale Law School, made the following statement in its report, dated March 21, 1961:

> In the present context one of the most significant developments in the Federal personnel system is the great and growing resort to temporary and intermittent personnel. The tremendous range and volume of governmental activities, much of which stems from technological developments and international problems, have brought government into intimate relationship with the economic life of the Nation and with social welfare, with the result that there are no longer clear boundaries between the private and the public sectors. This means, for one thing, that the National Government has major demands for qualified personnel of the sort needed by business organizations and other private institutions. What the Government must do is compete as best it can for the needed people. Thus, it is readily understandable that in many areas of activity the Government has to make use of people on a limited basis in the capacity of advisers, consultants, or experts. Nor is it likely that the occasion for this practice will lessen. Use of such semiemployees, partly in and partly outside Government, greatly complicates the problem of maintaining ethical standards in the Government for it inevitably multiplies the risks of conflicting interests.

At this date it is no longer open to question that many, if not most, of the departments and agencies find it necessary for the optimum performance of their tasks to make use of the skill, talent, and experience of leaders in the sciences, business, and the professions whose regular work is conducted in private spheres. Today's Government requires the part-time services of thousands of such persons to deal with problems of increasing complexity and scope. It can scarcely be questioned that a satisfactory means must be found of facilitating the employment of these individuals by the departments and agencies, as needed, without relaxing basic ethical standards or permitting actual conflicts of interest.

Congress has on a number of occasions recognized the obstacles faced by an agency requiring the part-time services of consultants and advisers and has granted the persons employed by the agency in that capacity a specified statutory exemption from some or all of the conflict laws. This hit-or-miss practice has produced unjustified inconsistencies and in some cases has resulted in the grant of unduly broad exemptions. Needless to say, general legislation doing away with the need for special treatment is a preferable course of action.

H.R. 8140 is intended to remedy the deficiencies and difficulties discussed above. It is the end result of protracted and careful studies both in and out of government, and this committee is of the view that it will achieve the goal set for it. In so doing, it will promote and balance the dual objectives of protecting government integrity and facilitating the Government's recruitment and retention of needed personnel.

SECTION-BY-SECTION ANALYSIS

Section 1(a) of the bill would amend chapter 11 of title 18, United States Code, by combining into a new section 201 the substance of the present sections 201 through 213 relating to bribery and graft. In addition section 1(a) of the bill would replace the present sections 281, 282, 283, 284, 434, and 1914 of title 18, all relating to conflicts of interest, with new sections 202 through 209. The renumbering and repeal of sections necessitated by the provisions of section 1(a) are accomplished by section 1 (b), (c), and (d) and by section 2.

The following references to sections 201 through 209 and section 218 refer to the proposed new sections of title 18 of which would be enacted by section 1 (a) and (e) of the bill.

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Section 209. Salary of Government officials and employees payable only by United States

Section 209 is similar to title 18, United States Code, section 1914. The latter prohibits a Government employee from receiving any salary in connection with his Government services from a private source. Subsection (a) of section 209 would reenact this prohibition in substance and, in addition, would make it an offense for anyone to make a payment to a Government employee the receipt of which would violate the section.

The present statute's ban on the receipt of private payments "in connection with" an employee's Government services is replaced in section 209(a) with a ban on the receipt of such payments "as compensation for" such services. The new language is more precise in expressing what is clearly intended by the present broad phrase.

Subsection (b) is a declaration that a Government employee covered by subsection (a) is not thereby prevented from continuing to participate in a bona fide pension or other welfare plan maintained by a former employer.

Subsection (c) exempts special Government employees and employees serving the Government without compensation from the application of subsection (a) and also grants a corresponding exemption to any outside person paying compensation to such individuals.

Subsection (d) specifies that the section does not prohibit the payment or acceptance of sums under the terms of the Government Employees Training Act.

The maximum penalties authorized by section 209 are a fine of $5,000 or imprisonment for 1 year, or both.

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APPENDIX C

87th Congress
1st Session

Report
No. 748

HOUSE OF REPRESENTATIVES

BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

JULY 20, 1961.—Referred to the House Calendar and ordered to be printed

Mr. MCCULLOCH, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 8140]

The Committee on the Judiciary, to whom was referred the bill (H.R. 8140) to strengthen the criminal laws relating to bribery, graft, and conflicts of interest, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

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PURPOSE OF THE BILL

The purpose of the bill is (1) to strengthen, revise, and simplify existing Federal conflict-of-interest laws, (2) to make appropriate general provision for consultants and temporary employees in the executive branch, the independent agencies and the District of Columbia, and (3) to integrate these conflict-of-interest laws with recodified prohibitions of bribery and graft—all to the end that improper and unethical practices will be prevented with-

out depriving the Government of the services of competent and conscientious men and women.

REASONS FOR THE BILL

Recent years have recorded a growing concern, both in and out of Congress, with the ever present and perplexing problems of how best to assure high ethical standards in the conduct of the Federal Government. The Committee on the Judiciary, as well as other congressional committees, has conducted investigations into conflict of interest cases arising in executive agencies of the Government. The consensus of public expressions on the subject has criticized existing Federal legislation in this area as inadequate and confused.

As a 1958 staff report of Subcommittee No. 5 of the Committee on the Judiciary observed:

> Existing conflict of interest law comprises overlapping, inconsistent and incomplete provisions • • • [1]

Similarly, in 1960, the chairman of a special committee on Federal conflict of interest laws of the Association of the Bar of the City of New York which conducted an extensive study of these laws has testified that:

> The statutory law—most of it a century old—is not broad enough to protect the Government against the manifold modern forms of conflict of interest.[2]

Soon after taking office the President of the United States appointed a special conflict of interest panel to study and report to him concerning appropriate legislative proposals in the conflict of interest area. On receipt

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[1] Staff of Subcommittee No. 5, House Committee on the Judiciary, 85th Cong., 2d sess., "Report on conflict of Interest Legislation," pts. I and II, (Committee print 1958), p. 2.

[2] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on "Federal Conflict of Interest Legislation," 86th Cong., 2d sess., Mar. 3, 1960, p. 388.

of the report of this panel the President, in a special message to Congress on conflicts of interest transmitted in April, had this to say about the existing conflict of interest statutes:

> Five of these statutes were enacted before 1873. Each was enacted without coordination with any of the others. No two of them use uniform terminology. All but one impose criminal penalties. There is both overlap and inconsistency. Every study of these laws has concluded that, while sound in principle, they are grossly deficient in form and substance.
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> The fundamental defect of these statutes as presently written is that: On the one hand, they permit an astonishing range of private interests and activities by public officials which are wholy incompatible with the duties of public office; on the other hand, they create wholly unnecessary obstacles to recruiting qualified people for Government service. This latter deficiency is particularly serious in the case of consultants and other temporary employees, and has been repeatedly recognized by Congress in its enactment of special exemption statutes.[3]

The previous administration also took a profoundly constructive interest in the problems of conflict of interest in Federal employment. In June 1960, an Assistant Attorney General of the United States testified in detail and at length before Subcommittee No. 5 in exposition of the administration's views, calling for a thorough revision and strengthening of existing law.

There are eight statutes of general application termed "Conflict-of-interest" statutes. They cover four basic problems:

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[3] Message from the President of the United States, H. Doc. No. 145, 87th Cong., 1st sess., Apr. 27, 1961, p. 3.

The Government official or employee who acts for an outside interest in certain dealings with the Government (18 U.S.C. 281, 282, 283, 216).

The Government official or employee who acts on behalf of the Government in a business transaction with an entity in which he has a personal economic stake (18 U.S.C. 434).

The former Government official or employee who acts in a representative capacity in certain transactions with the Government during the 2-year period after termination of his Government service (18 U.S.C. 284; 5 U.S.C. 99).

The Government official or employee who receives compensation from a private source for his Government work (18 U.S.C. 1914).

Insofar as these statutes lay down the basic law restricting the private economic activities of public officers and employees they constitute a sound and necessary standard of conduct. The principle which they embody in varying form—that a public servant owes undivided loyalty to the Government—is as important today as when the first of these statutes was enacted more than a century ago. However, these statutes were not adopted as a whole, but achieved their initial enactment, one at a time, over a long period, in response to specific existing evils which, from time to time were important political issues. As a result, large areas of potential conflict of interest were left uncovered.

For example, where some of the conflict of interest statutes are restricted to "claims against the United States" (18 U.S.C. 283, 284; 5 U.S. 99), the courts have held that they do not protect the Government against the use of official position, influence, or inside information to aid private parties in government proceedings which involve no claim for money or property. Yet the danger of abuses of Government position exist to an equal if not

greater degree in proceedings such as applications for television and radio licenses, airline routes, electrical power sites, and the like. Literally read, existing law thus makes it a crime punishable by fine and imprisonment for a postal clerk to assist his mother in filing a routine claim for a tax refund, but does not prohibit a Cabinet officer from seeking to influence an independent agency to award a license for a valuable television station to a business venture in which he shared the profits.

There are many other technical inadequacies and statutory gaps. Section 434 of title 18, born of the Civil War procurement scandals, prohibits a Government official interested in the pecuniary profits of a business entity from acting as an officer or agent of the United States for the transaction of business with that business entity. By limiting its scope to "business entities" the statute does not cover the many other organizations which deal with the Government. In addition, the concept of "transacting business," if narrowly construed—as would be likely in a criminal prosecution—would exclude many dealings with the Government, such as the clearance or rejection of license applications in the executive branch or before an independent agency.

Similar defects exist in the case of Government officials who have left Government service. Clearly such an official should be prohibited from resigning his position and "switching sides" in a matter which was before him in his official capacity. But the statutes aimed at this situation do not always hit the mark. There is nothing in the criminal statutes which would prevent the General Counsel of the Federal Power Commission from resigning to represent an unsuccessful license applicant who is contesting the Commission's decision in the courts (although such conduct might be grounds for disbarment). And, a Commission employee who was not a lawyer could, in the present state of the law, unscrupulously benefit in such a case from his "inside information" without fear of sanc-

tions. Other similar statutory deficiencies in the present conflict of interest laws will be discussed in connection with the analysis of the bill's provisions.

But if the statutes often leave important areas unregulated, they also often serve as a possible bar to securing important personal services for the Government through excessive regulation when little or no ethical problem really exists. Fundamentally, this is because the statutes fail to take into account the role, primarily in the executive branch of our Government of the part-time or intermittent adviser whose counsel has become essential, but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required by these laws. Such problems are encountered when the Government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist.

In general, these difficulties stem from the fact that even occasional consultants are regarded as "officers or employees" of the Government, whether or not compensated. As such, they are within the prohibitions applicable to regular full-time personnel.

A few examples illustrate some of the difficulties:

Section 281 of the Criminal Code forbids public employees from providing services to outsiders for compensation in connection with any matter in which the United States is interested and which is before a department, agency, or commission.

This section makes it difficult for a practicing lawyer to accept a part-time position with the Government. He would be in violation of section 281 if he continued to receive compensation for cases before Government agencies, or even if his law partnership receives such compensation, though he personally has no connection with any case. It is usually impractical for the law firm to withdraw from all transactions involving the Government.

And almost all law firms have some tax matters, for example, as part of their normal business. The same prohibition unfairly affects accountants.

In addition, the two existing postemployment statutes raise serious problems in terms of recruiting noncareer personnel (particularly lawyers). Enacted at different times, they employ different terms and are totally uncoordinated in language or in policy. The criminal statute (18 U.S.C. 284) forbids a former employee for 2 years after his Government employment ceases to prosecute in a representative capacity any claim against the Government involving a "subject matter" directly connected with his Government job. The civil statute (5 U.S.C. 99) forbids employees of an executive department for 2 years after the end of their Government service from prosecuting in a representative capacity any claim against the United States if the claim was pending before "any department" while he was an employee.

Although too narrow in their limitation to "claims against the United States," these prohibitions are also unnecessarily broad. They should be confined to instances of "switching sides." For example, they now prohibit a lawyer who worked for the Department of Labor from subsequently representing a client in a wholly unrelated tax matter which had been before the Treasury during his Government service.

These restrictions also present grave problems to the part-time consultant who works in a partnership since he and his partners would be excluded from participation in many if not all claims against the Government—a drastic penalty for contributing to public service. It is possible to cite other examples of excessive restrictions which serve no substantial ethical purpose, but deprive the Government of access to available talent.

It is true that a large number of statutory exemptions passed at various times over the years have mitigated

some of the adverse effects of these statutes upon certain specific individuals and certain categories of employees. However, no uniform standard of exemption has ever been adopted by Congress in enacting these exemptions. Some are subject to many limitations. Some statutes unqualifiedly exempt categories of employees from all of the conflict statutes while others exempt them from some but not all of the restrictions. The resulting hodgepodge of exemptions seriously weakens the integrity of the Government personnel system.

It is manifest to the Committee on the Judiciary that the existing Federal conflict of interest laws require revision. The proper operation of a democratic government requires that officials be independent and impartial; that Government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. The attainment of one or more of these ends is impaired whenever there exists, or appears to exist, an actual or potential conflict between the private interests of a Government employee and his duties as an official. The public interest, therefore, requires that the law protect against such conflicts of interest and establish appropriate ethical standards with respect to employee conduct in situations where actual or potential conflicts exist.

It is also fundamental to the effectiveness of democratic government that, to the maximum extent possible, the most qualified individuals in the society serve its government. Accordingly, legal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most qualified to serve it. An essential principle underlying the staffing of our governmental structure is that all its employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic

and other interests, except where actual or potential conflicts with the responsibility of such employees to the public cannot be avoided.

What is more, the provisions of the Criminal Code which prohibit bribery—the payment or receipt of anything of value for official action or with intent that official action shall be influenced thereby—are central to any comprehensive codification of Federal conflict of interest statutes. When a bribe is exchanged, the parties have, in effect, conspired to deprive the United States of the honest services of its official. Such conduct is universally condemned. Nothing is more corrosive to the fabric of good government than bribery, and the criminal laws seek to preserve to the United States the value of the honest services of its officials and employees by severely punishing their sale.

The close interrelationship between the Federal bribery statutes and those prohibiting conflicts of interest is readily apparent. Sections 281 and 216 of title 18 prohibit the sale, by way of services, of confidential information, prestige, or influence which comes to an official by virtue of his office, in effect in trust. Section 434 protects the Government from the adverse consequences of being represented in business transactions by officials having an interest in the other party. Section 1914 seeks to avoid divided loyalty of Government officials by prohibiting private compensation of Government services. Indeed, the U.S. Supreme Court has stated that the prohibitions of sections 281, 216, 434, and 1914 "were directed at the crime of bribery in its open or subtle form" (*Muschany* v. *United States*, 324 U.S. 49 (1945)). In light of this interrelationship, the committee deems it desirable that Federal bribery and conflict of interest laws should comprise a consistent and coordinated whole.

The nine sections of chapter 11 of title 18 of the United States Code ("Bribery and Graft") which prohibit in general terms the bribery of Government officials (secs.

201 and 202), Members of Congress (secs. 204 and 205), judges and judicial officers (including jurors) (secs. 206, 207, and 208), and witnesses (secs. 209 and 210) vary markedly in the terms in which they define the subject of a forbidden transfer—the bribe itself—and in the character of the intent or purpose which renders the transfer criminal. There are also notable disparities as to penalties. Under present law, for example, one who offers a juror a gift in appreciation of a verdict faces a maximum penalty of $20,000 fine, 15 years' imprisonment, or both, in addition to mandatory disqualification for any office of honor, trust, or profit (18 U.S.C. 206). This is so even though the offer was made after the verdict was brought in and could not have influenced it.

On the other hand, a juror who brazenly solicits or accepts a bribe before verdict faces a maximum punishment of only $2,000 fine, 2 years' imprisonment, or both —and is not disqualified for office.

Other inequalities and numerous technical deficiencies could also be cited. Existing bribery law should be simplified and strengthened by eliminating unwarranted nonuniformity, reducing unnecessary duplication, and supplying omissions where needed. Confusion will be reduced by drastically cutting the number of separate sections that now deal with bribery.

Legislative Background

The bill is the fruit of more than 3 years of study by Subcommittee No. 5 of the Committee on the Judiciary and represents the result of subcommittee consideration of H.R. 3411 and H.R. 3412, identical measures introduced by Representatives Celler and McCulloch, respectively; H.R. 3050, introduced by Representative Lindsay; and H.R. 7139, introduced by Representative Holtzman.[4] Its history may be reviewed briefly.

[4] The subcommittee also considered H.R. 302 introduced by Representative Bennett, of Florida.

In 1957, Chairman Celler instructed the staff of the Subcommittee No. 5 to prepare a detailed study and analysis of existing Federal conflict-of-interest laws to the end that they might be revised, simplified, and coordinated to prevent improper and unethical practices, while at the same time preserving the dignity of Government service and maintaining its attractiveness to competent men and women. Parts I and II of the resulting study were issued in March 1958. They analyzed Federal statutes on conflict of interest and bribery and presented certain recommendations for amendment of these statutes. On May 19, 1958, Representative Celler introduced H.R. 12547 (85th Cong.), based on these recommendations. Parts III, IV, and V of the staff study were issued later in the same year, discussing pending legislative proposals, agency regulations, and a proposed code of ethics.

In the 86th Congress Representative Celler reintroduced H.R. 12547 as H.R. 2156. Hearings on H.R. 2156 and a number of related measures were held by the subcommittee on February 17, 18, 19, 24, 25, 26, May 25 and June 1, 1960. The subcommittee heard sponsors of the bills and representatives of many Federal agencies and of four bar associations. In the course of these hearings a committee print of H.R. 2156, engrafting certain language suggested in the testimony elicited from witnesses, was prepared and introduced in the record. The 86th Congress expired, however, before definitive action could be taken.

H.R. 3411 and H.R. 3412, the identical bills introduced by Representatives Celler and McCulloch in the present Congress, were based on the committee print of H.R. 2156, 86th Congress.

The history of H.R. 3050 is as follows. A penetrating 2-year study of the operation of the Federal conflict-of-interest statutes undertaken by a special committee on conflict of interest laws of the Association of the Bar of

the City of New York, was completed in time for the introduction and consideration during the subcommittee's 1960 hearings of Representative Lindsay's bill, H.R 10575 (86th Congress), which embodies the conclusions and recommendations of that distinguished group. Accordingly, Subcommittee No. 5 received extended testimony from Mr. Roswell Perkins, chairman of the bar association committee. A number of the changes appearing in H.R. 3411 and H.R. 3412 had their origin in the bar association proposal which was reintroduced in the present Congress by Representative Lindsay as reintroduced in the present Congress by Representative Lindsay as H.R. 3050.

H.R. 7139 was proposed by the administration and introduced by Mr. Holtzman. In his special message to Congress in April 1961, the President stated that to meet the need for statutory reform described in his message, he was transmitting to Congress a proposed Executive Employees Standards Act,

> * * * a comprehensive revision of existing conflict-of-interest statutes.

The President stated that he believes—

> that this bill maintains the highest possible standard of conduct, eliminates the technical deficiencies and anachronisms of existing laws, and makes it possible for the Government to mobilize a wide range of talent and skill.

After introduction and referral of H.R. 7139, Subcommittee No. 5, on June 1 and 2, 1961, conducted further hearings on pending bribery and conflict-of-interest legislation, receiving testimony from Members of Congress and representatives of the Department of Justice, the Comptroller General of the United States, the Civil Service Commission, the President's Special Committee on Conflicts of Interest, and the Association of the Bar of the City of New York.

Subsequently the present bill, based upon and containing features of the provisions of H.R. 3411, H.R. 3412, H.R. 3050, and H.R. 7139, was reported by the subcommittee.

SUMMARY OF PROVISIONS

The bill (1) continues with strengthening charges the prohibitions of present conflict-of-interest laws, specifically including officers and employees of the District of Columbia (secs. 202-209); makes special provisions applicable to consultants and temporary employees who fall within a definition of "special Government employee" (sec. 202); consolidates and revises the laws prohibiting bribery (sec. 201), and incorporates the revised bribery and conflict-of-interest provisions in a single chapter of the Criminal Code to be captioned "Bribery, Graft, and Conflicts of Interest." Principal provisions of the bill are here summarized. (Detailed analysis will follow.)

* * * *

(*i*) *Salary to be paid only by the United States.*—Section 1914 of present law prohibits Government officers and employees from receiving from private sources any salary "in connection with" their Government service, and also prohibits private parties from contributing to or supporting Government salaries, all on pain of fine and/or imprisonment. The bill continues these prohibitions with certain changes.

The language of present section 1914 is unsatisfactory in two respects: first, the expression "in connection with" is imprecise; second, the language prohibiting the receipt of supplements to a salary and that prohibiting the payment or supplementation differ in detail.

Accordingly, the bill (sec. 209) prohibits the receipt from private sources of any salary, or contribution to or supplementation of salary, *as compensation for* services as an officer or employee of the United States Government in the executive branch, of any independent agency, or of

the District of Columbia, and also prohibits the payment, contribution or supplementation of a Government salary "under circumstances which would make its receipt a violation".

Further, the bill makes clear that continued participation in any bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer does not violate section 209, and also exempts the payment or acceptance of contributions, awards, and other expenses under the Government Employees Training Act (72 Stat. 327; 5 U.S.C. 2301-2319).

Finally, the provisions of section 209 are inapplicable to special Government employees and Government employees serving without compensation.

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SECTIONAL ANALYSIS

SECTION 1(A)

Section 1(a) of the bill would amend chapter 11 of title 18, United States Code, which deals with bribery and graft, by combining several separate bribery sections of limited application (present secs. 201 through 213) into one comprehensive section (201) and by adding several new sections dealing with conflicts of interest (202 through 209 and 218). The latter sections would replace existing conflict-of-interest sections (281, 282, 283, 284, 434, and 1914) scattered throughout chapters 15, 23, and 93 of title 18. The existing conflict-of-interest sections would be repealed by section 2 of the bill, except that sections 281 and 283 would continue in effect (as the same sections of ch. 15) to the extent that they apply to retired officers of the Armed Forces.

Chapter 11 of title 18, United States Code, as so amended, would be captioned, "Bribery, Graft, and Conflicts of Interest."

The following references to section 201, et seq., relate to proposed new sections of title 18 which would be enacted by section 1(a) of this bill.

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Salary of Government officials and employees payable only by United States (sec. 209)

Section 209 varies only to a minor extent in its substantive prohibitions from the section which it would replace, 18 U.S.C. 1914, which prohibits a Government employee from receiving compensation for his Government service from private sources and also prohibits any nongovernmental person or organization from paying or supplementing the employee's Government salary for such service.

Section 1914 prohibits the receipt of private "salary" in connection with an employee's Government services. Section 209 prohibits the receipt of salary, "or any contribution to or supplementation of salary," to conform with the equivalent prohibition imposed upon the payor by section 209.

Whereas the prohibition of section 1914 applies to private salary paid "in connection with" the Government services of the employee, section 209 substitutes the phrase "as compensation for" his services as an officer or employee in order to emphasize the intent that the prohibition is against private payment made expressly for services rendered to the Government. The phrase "in connection with" is vague and capable of an indefinitely broad interpretation.

The enumeration of persons forbidden to pay a Government employee for his Government services is extended by section 209 to include a "partnership" and "other organization," and "an individual" is substituted for "a person." The modified enumeration is more comprehensive than in section 1914 and makes clear the intent

that any kind of organization, whether profit or non-profit, should be subject to the prohibition of the section.

Participation in employee welfare or benefit plans maintained by a former employer would be permitted by subsection (b). The prohibitions of section 209 would be made inapplicable by subsection (c) to a special Government employee and to any person serving without compensation, and by subsection (d) to contributions and awards authorized by the Government Employees Training Act.

The inclusion of the specified exceptions is not to be construed as limiting the right of an employee to receive compensation from private sources except as payment for his services as a Government official. The section does not bar private employment or other activities not connected with the Government position of the official and not proscribed by other statutory prohibitions.

The penalty provision of section 1914 is increased in section 209 from a fine of not more than $1,000 or imprisonment for not more than 6 months, or both, to a maximum fine of $5,000 or maximum imprisonment of 1 year or both.

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SECTION 2

Existing criminal conflict-of-interest statutes (18 U.S.C. 281, 282, 283, 284, 434, and 1914) are expressly repealed by the bill, except that sections 281 and 283 are continued in effect insofar as they may apply to retired officers of the Armed Forces. Existing exemptions from the title 18 conflict-of-interest sections which are repealed would be preserved as exemptions from the proposed counterpart sections of title 18, except to the extent that the exemptions affect officers or employees of the executive branch, of an independent agency, or of the District of Columbia, as to whom they no longer would be applicable. The new standards established by the bill itself

for special Government employees is intended as a complete substitute for the present ad hoc exemptions of persons in that classification.

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CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman).

New provisions proposed by H.R. 8140

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

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§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

Comparable provisions of existing law repealed by H.R. 8140, except as otherwise noted

[CHAPTER 11—BRIBERY AND GRAFT

* * * *

[§ 1914. Salary of Government officials and employees payable only by United States.

[Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

[Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States—

[Shall be fined not more than $1,000 or imprisoned not more than six months, or both.]

* * * *

APPENDIX D

87th Congress
1st Session

Document
No. 145

HOUSE OF REPRESENTATIVES

ETHICAL CONDUCT IN THE GOVERNMENT

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RELATIVE TO

ETHICAL CONDUCT IN THE GOVERNMENT

APRIL 27, 1961.—Referred to the Committee on the Judiciary and ordered to be printed

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To the Congress of the United States:

No responsibility of Government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality, and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective Government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

I have firm confidence in the integrity and dedication of those who work for our Government. Venal conduct by public officials in this country has been comparatively rare—and the few instances of official impropriety that have been uncovered have usually not suggested any widespread departure from high standards of ethics and moral conduct.

Nevertheless, in the past two decades, incidents have occurred to remind us that the laws and regulations governing ethics in Government are not adequate to the changed role of the Federal Government, or to the changing conditions of our society. In addition, many of the ethical problems confronting our public servants have become so complex as to defy easy commonsense solutions on the part of men of good will seeking to observe the highest standards of conduct, and solutions have been hindered by lack of general regulatory guidelines. As a result many thoughtful observers have expressed concern about the moral tone of Government, and about the need to restate basic principles in their application to contemporary facts.

Of course, public officials are not a group apart. They inevitably reflect the moral tone of the society in which they live. And if that moral tone is injured—by fixed athletic contests or television quiz shows—by widespread business conspiracies to fix prices—by the collusion of businessmen and unions with organized crime—by cheating on expense accounts, by the ignoring of traffic laws, or by petty tax evasion—then the conduct of our Government must be affected. Inevitably, the moral standards of a society influence the conduct of all who live within it—the governed and those who govern.

The ultimate answer to ethical problems in Government is honest people in a good ethical environment. No web of statute or regulation, however intricately conceived, can hope to deal with the myriad possible chal-

lenges to a man's integrity or his devotion to the public interest. Nevertheless formal regulation is required—regulation which can lay down clear guidelines of policy, punish venality and doubledealing, and set a general ethical tone for the conduct of public business.

Such regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity. Today's Government needs men and women with a broad range of experience, knowledge, and ability. It needs increasing numbers of people with topflight executive talent. It needs hundreds of occasional and intermittent consultants and part-time experts to help deal with problems of increasing complexity and technical difficulty. In short, we need to draw upon America's entire reservoir of talent and skill to help conduct our generation's most important business—the public business.

This need to tap America's human resources for public purposes has blurred the distinctions between public and private life. It has led to a constant flow of people in and out of business, academic life and Government. It has required us to contract with private institutions and call upon part-time consultants for important public work. It has resulted in a rapid rate of turnover among career Government employees—as high as 20 percent a year. And, as a result, it has gravely multiplied the risk of conflicts of interest while seriously complicating the problem of maintaining ethical standards.

These new difficulties and old problems led me to appoint, immediately after my inauguration, three distinguished lawyers to review our existing conflict-of-interest laws and regulations. This panel was composed of Judge Calvert Magruder, retired chief judge of the First Judicial Circuit; Dean Jefferson B. Fordham of the University of Pennsylvania Law School; and Prof. Bayless Manning of the Yale Law School. The proposals

put forward in this message are in large measure based upon their work and that of others who have considered the problems in recent years.

The recommenadtions of this panel were arrived at after careful study and review of the work of other groups, particularly the 1958 staff report of the Antitrust Subcommittee of the House Judiciary Committee under Congressman Celler; the pioneering study in 1951 by a subcommittee of the Senate Committee on Labor and Public Welfare under Senator Douglas; the recent report of the staff of the Senate Subcommittee on National Policy Machinery of the Committee on Government Operations headed by Senator Jackson; and valuable appraisals conducted during the last administration by the executive branch, and by the Association of the Bar of the City of New York.

All of these studies have emphasized the seriousness of the problem encountered. All have recommended that our outmoded and hodgepodge collection of statutes and regulations be amended, revised, and strengthened to take account of new problems. If the proposals have varied in their details, all have underscored the need for legislative and executive action in a commonly agreed direction.

I. Statutory Reform

There are seven statutes of general application termed "conflict-of-interest" statutes. Many others deal with particular offices or very limited categories of employees. These latter usually exempt officials from some or all of the general restrictions. Occasionally they impose additional obligations.

The seven statutes cover four basic problems:

The Government employee who acts on behalf of the Government in a business transaction with an entity in which he has a personal economic stake (18 U.S.C. 434).

The Government employee who acts for an outside interest in certain dealings with the Government (18 U.S.C. 216, 281, 283).

The Government employee who receives compensation from a private source for his Government work (18 U.S.C. 1914).

The former Government employee who acts in a representative capacity in certain transactions with the Government during a 2-year period after the termination of his Government service (18 U.S.C. 284, 5 U.S.C. 99).

Five of these statutes were enacted before 1873. Each was enacted without coordination with any of the others. No two of them use uniform terminology. All but one impose criminal penalties. There is both overlap and inconsistency. Every study of these laws has concluded that, while sound in principle, they are grossly deficient in form and substance.

The fundamental defect of these statutes as presently written is that: On the one hand, they permit an astonishing range of private interests and activities by public officials which are wholly incompatible with the duties of public office; on the other hand, they create wholly unnecessary obstacles to recruiting qualified people for Government service. This latter deficiency is particularly serious in the case of consultants and other temporary employees, and has been repeatedly recognized by Congress in its enactment of special exemption statutes.

Insofar as these statutes lay down the basic law restricting the private economic activities of public officers and employees they constitute a sound and necessary standard of conduct. The principle which they embody in varying form—that a public servant owes undivided loyalty to the Government—is as important today as when the first of these statutes was enacted more than

a century ago. However, the statutory execution of this principle in the seven statutes of general application was often directed to specific existing evils which at the time of their enactments were important political issues. As a result large areas of potential conflict of interest were left uncovered.

For example, where some of these conflict-of-interest statutes are restricted to "claims of money and property"—as the courts have said—they do not protect the Government against the use of official position, influence, or inside information to aid private individuals or organizations in Government proceedings which involve no claims for money or property. Yet the danger of abuses of Government position exist to an equal if not greater degree in proceedings such as license applications for TV or radio stations, airline routes, electric power sites, and similar requests for Government aid, assistance, or approval.

Thus, literally read, it would be a crime punishable by fine or imprisonment under these statutes for a postal clerk to assist his mother in filing a routine claim for a tax refund, but it would be permissible for a Cabinet officer to seek to influence an independent agency to award a license for a valuable TV station to a business associate in a venture where he shared the profits.

There are many other technical inadequacies and statutory gaps. Section 434 of title 18, born of the Civil War procurement scandals, prohibits a Government official interested in the pecuniary profits of a business entity from acting as an officer or agent of the United States for the transaction of business with that business entity. By limiting its scope to "business entities" the statute does not cover the many other organizations which deal with the Government. In addition, the concept of "transacting business," if narrowly construed, as would be likely in a criminal prosecution, would exclude many dealings with

the Government, such as the clearance or rejection of license applications in the executive branch or before an independent agency.

Similar defects exist in the case of Government officials who have left Government service. Clearly such an official should be prohibited from resigning his position and "switching sides" in a matter which was before him in his official capacity. But for technical reasons the statutes aimed at this situation do not always hit the mark. There is nothing in the criminal statutes which would prevent the General Counsel of the Federal Power Commission from resigning to represent an unsuccessful license applicant who is contesting the Commission's decision in the courts (although such conduct might be grounds for disbarment). And, a Commission employee who was not a lawyer could, in the present state of the law, unscrupulously benefit in such a case from his "inside information" without fear of sanctions.

But if the statutes often leave important areas unregulated, they also often serve as a bar to securing important personal services for the Government through excessive regulation when no ethical problem really exists. Fundamentally, this is because the statutes fail to take into account the role in our Government of the part-time or intermittent adviser whose counsel has become essential but who cannot afford to be deprived of private benefits, or reasonably requested to deprive himself, in the way now required by these laws. Wherever the Government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist, such problems are encountered.

In general, these difficulties stem from the fact that even occasional consultants can technically be regarded as either "officers or employees" of the Government, whether or not compensated. If so, they are all within the prohibitions applicable to regular full-time personnel.

A few examples illustrate some of the difficulties:

Section 281 of the Criminal Code forbids public employees from providing services to outsiders for compensation in connection with any matter in which the United States is interested and which is before a department, agency, or commission.

This section makes it almost impossible for a practicing lawyer to accept a part-time position with the Government. He would be in violation of section 281 if he continued to receive compensation for cases before Government agencies, or even if his law partnership receives such compensation, though he personally has no connection with any case. It is usually impractical for the law firm to withdraw from all transactions involving the Government. And almost all law firms have some tax matters, for example, as part of their normal business. The same prohibition unfairly affects accountants.

In addition, the two existing postemployment statutes raise serious problems in terms of recruiting noncareer personnel (particularly lawyers). Enacted at different times, they employ different terms and are totally uncoordinated in language or in policy.

The criminal statute (18 U.S.C. 284) forbids a former employee for 2 years after his Government employment ceases to prosecute in a representative capacity any claim against the Government involving a "subject matter" directly connected with his Government job. The civil statute (5 U.S.C. 99) forbids employees of an executive department for 2 years after the end of their Government service from prosecuting in a representative capacity any claim against the United States if the claim was pending before "any department" while he was an employee.

These prohibitions are unnecessarily broad. They should be confined to "switching sides." For example, they now prohibit a lawyer who worked for the Department of

Labor from subsequently representing a client in a wholly unrelated tax matter which had been before the Treasury during his Government service.

These restrictions prove an even more formidable barrier to the part-time consultant who works in a partnership since he and his partners would be excluded from participation in many if not all claims against the Government—a severe and unnecessary penalty for contributing to public service. It is possible to cite many other examples of excessive restrictions which serve no ethical purpose, but effectively bar Government from using available talent.

It is true that a large number of statutory exemptions passed at various times over the years have mitigated some of the adverse effects of these statutes upon certain specific individuals and certain categories of employees. However, no uniform standard of exemption has ever been adopted by the Congress in enacting these exemptions. Many of the exemptions are inconsistent. Some exemptions are subject to so many limitations as practically to nullify them. Some statutes unqualifiedly exempt categories of employees from all of the conflict statutes. Others exempt them from some but not all of the restrictions. The resulting hodgepodge of exemptions seriously weakens the integrity of the Government personnel system.

To meet this need for statutory reform, I am transmitting to the Congress a proposed Executive Employees' Standards Act—a comprehensive revision of existing conflict-of-interest statutes. I believe that this bill maintains the highest possible standards of conduct, eliminates the technical deficiencies and anchronisms [sic] of existing laws, and makes it possible for the Government to mobilize a wide range of talent and skill.

First, the bill closes gaps in regulation of the type discussed above, and eliminates many of the pointless

differences in treatment. For example, no longer will some former Government employees be subject to more severe restrictions simply because they once worked for 1 of the 10 executive "departments" rather than in an agency which is not technically a department.

Secondly, the bill overrules existing judicial interpretation that only when a claim for money or property is involved is a former Government employee prohibited from working for a private interest in a matter for which he once had governmental responsibility. The basic issue of integrity is the same if the matter relates to Government regulation rather than to a property or money claim.

Third, the bill establishes special standards for skilled individuals whose primary activity is in private professional or business life, but whose skills are used by the Government on a part-time or advisory basis. By permitting such individuals to carry on private business, even business with the Government, as long as there is no direct conflict between their private and public work, ethical principles are maintained and a wide range of abilities are made available to Government.

Fourth, this bill adds to the traditional criminal sanctions by permitting agency heads to adopt implementing regulation and impose disciplinary measures. Most of the existing laws are criminal statutes. As such they have been strictly construed and, because of their harshness, infrequently invoked. By granting this added flexibility we help to insure more effective enforcement. In addition, the regulations which are adopted will permit more specific adaptation of the general prohibitions tailored to the activities of particular agencies.

Fifth, the bill deals only with employees involved in executive, administrative, and regulatory functions. It does not apply to either the judicial or legislative branch of Government. Existing laws relating to the judiciary

are deemed adequate. The adequacy and effectiveness of laws regulating the conduct of Members of Congress and congressional employees should be left to strictly congressional determination.

Sixth, the proposed bill covers the District of Columbia and its employees. However, the District, essentially a municipal government, has its own distinctive problems. I will submit legislation dealing with these problems in the near future.

II. Ex Parte Contacts With Officials of Independent Agencies

Some of the most spectacular examples of official misconduct have involved ex parte communication—undisclosed, informal contact between an agency official and a party interested in a matter before that official. Such covert influence on agency action often does basic injury to the fairness of agency proceedings, particularly when those proceedings are judicial in nature.

This problem is one of the most complex in the entire field of Government regulation. It involves the elimination of ex parte contacts when those contacts are unjust to other parties, while preserving the capacity of any agency to avail itself of information necessary to decision. Much of the difficulty stems from the broad range of agency activities—ranging from judicial-type adjudication to wide-ranging regulation of entire industries. This is a problem which can best be resolved in the context of the particular responsibilities and activities of each agency.

I therefore recommend that the Congress enact legislation requiring each agency, within 120 days, to promulgate a code of behavior governing ex parte contacts within the agency specifying the particular standard to be applied in each type of agency proceeding, and containing an absolute prohibition against ex parte contact

in all proceedings between private parties in which law or agency regulation requires that a decision be made solely on the record of a formal hearing. Only in this manner can we assure fairness in quasi-judicial proceedings between private parties. The statute should make clear that such codes when approved by Congress will have the force of law, and be subject to appropriate sanctions.

III. Executive Orders and Presidential Action

There are several problems of ethics in Government which can be dealt with directly by Presidential order, memoranda, or other form of action.

First, I intend to prohibit gifts to Government personnel whenever (*a*) the employee has reason to believe that the gift would not have been made except for his official position; or (*b*) whenever a regular Government employee has reason to believe that the donor's private interests are likely to be affected by actions of the employee or his agency. When it is impossible or inappropriate to refuse the gift it will be turned over to an appropriate public or charitable institution.

Such an order will embody the general principle that any gift which is, or appears to be, designed to influence official conduct is objectionable. Government employees are constantly bothered by offers of favors or gratuities and have been without any general regulation to guide their conduct. This order will attempt to supply such guidelines, while leaving special problems including problems created by gifts from foreign governments, to agency regulation.

Secondly, I intend to prohibit Government employees from using for private gain official information which is not available to the public. This regulation will be drawn with due regard for the public's right to proper access to public information. A Government employee should not

be able to transform official status into private gain, as is done, for example, if a Government employee speculates in the stock market on the basis of advance knowledge of official action.

Third, I am directing that no Government employee shall use the authority of his position to induce another to provide him with anything of economic value whenever the employee has reason to believe that the other person's private interests may be affected by the actions of the employee or his agency.

This regulation is an effort to deal with the subtler forms of extortion; where an employee acquiesces in the gift of an economic benefit, or gives a delicat indication of receptivity. The criminal law deals with outright extortion. Beyond this the problem is too elusive for the criminal law and must be dealt with by administrative regulation, and by the sound judgment of the administrator.

Fourth, I am directing that no Government employee should engage in outside employment which is "incompatible" with his Government employment.

The outside employment of Government employees is one of the most complex and difficult of all ethical problems. It is clear that some forms of employment may have benefits to the Government or society (e.g., teaching in universities); or be beneficial to the employee and not inconsistent with his Government work. On the other hand, some types of outside work may involve exploitation of official position or be incompatible with the best interests of the agency to which the employee owes his first allegiance.

Since "incompatibility" of employment will depend on many varied factors, its definition will be left to agency and department regulation and case-by-case rulings.

Fifth, I will shortly issue an Executive order regulating in more detail the conduct of those officials who are appointed by the President. These high-level officials owe a special responsibility to the Government and to the employees of their departments to set a high standard of ethical and moral behavior. Therefore the Executive order (*a*) prohibits outside employment or activity of any sort incompatible with the proper discharge of official responsibility; (*b*) prohibits outside compensation for any activity within the scope of official duty; (*c*) prohibits the receipt of compensation for any lecture, article, public appearance, etc., devoted to the work of the department or based on official information not yet a matter of general knowledge.

Sixth, in carrying out the provisions of law, I will apply Government-wide standards to the continuance of property holdings by appointees to the executive branch. The law prohibits any conflict of the public and private interests of employees of the Government. The Senate, in the exercise of its power of confirmation, has taken the lead in requiring that Presidential appointees sell their property holdings in cases where retention of property might result in such a conflict of interest. The problem of property ownership by Executive appointees is properly a matter of continuing congressional concern, and I welcome the initiative taken by the Jackson Subcommittee on Conflict of Interest. At the same time, the executive branch has an obligation to insure that its appointees live up to the highest standard of behavior. It is to carry out this responsibility that I will apply general standards governing the ownership of property by Presidential appointees—standards which will insure that no conflict of interest can exist. It is my hope that these regulations will aid the Senate in the uniform exercise of its own responsibility.

IV. The Administration of Ethical Standards

Criminal statutes and Presidential orders, no matter how carefully conceived or meticulously drafted, cannot hope to deal effectively with every problem of ethical behavior of conflict of interest. Problems arise in infinite variation. They often involve subtle and difficult judgments, judgments which are not suited to generalization or Government-wide application. And even the best of statutes or regulations will fail of their purpose if they are not vigorously and wisely administered.

Therefore I am instructing each Cabinet member and agency head to issue regulations designed to maintain high moral and ethical standards within his own department. These regulations will adapt general principles to the particular problems and activity of each agency. To aid in the administration of these regulations each agency will establish an ad hoc committee to serve in an advisory capacity on ethical problems as they arise.

Although such agency regulation is essential, it cannot be allowed to dissolve into a welter of conflicting and haphazard rules and principles throughout the Government. Regulation of ethical conduct must be coordinated in order to insure that all employees are held to the same general standards of conduct.

Therefore I intend to designate, in the Executive Office of the President, a single officer charged with responsibility for coordinating ethics administration and reporting directly to the President. This office will—

prepare, for Presidential proclamation, general regulations as needed;

develop methods of informing Government personnel about ethical standards;

conduct studies and accumulate experience leading to more effective regulation of ethical conduct, including the formulation of rules in areas which are

not yet regulated, such as Government use of outside advisers and the contracting of Government services to private institutions or firms; and

clear and coordinate agency regulations to assure consistent executive policy.

Such an officer will not only provide central responsibility for coherent regulation, but will be a means through which the influence of the Presidency can be exerted in this vital field.

V. Conclusion

Ultimately, high ethical standards can be maintained only if the leaders of Government provide a personal example of dedication to the public service—and exercise their leadership to develop in all Government employees an increasing sensitivity to the ethical and moral conditions imposed by public service. Their own conduct must be above reproach. And they must go beyond the imposition of general regulations to deal with individual problems as they arise—offering informal advice and personal consideration. It will often be difficult to assess the propriety of particular actions. In such subtle cases honest disclosure will often be the surest solution, for the public will understand good faith efforts to avoid improper use of public office when they are kept informed.

I realize, too, that perhaps the gravest responsibility of all rests upon the office of President. No President can excuse or pardon the slightest deviation from irreproachable standards of behavior on the part of any member of the executive branch. For his firmness and determination is the ultimate source of public confidence in the Government of the United States. And there is no consideration that can justify the undermining of that confidence.

The White House
April 27, 1961

John F. Kennedy

APPENDIX E

DEPARTMENT OF JUSTICE

Office of the Attorney General

MEMORANDUM REGARDING CONFLICT OF INTEREST PROVISIONS OF PUBLIC LAW 87-849

January 28, 1963.

Public Law 87-849, "To strengthen the criminal laws relating to bribery, graft, and conflicts of interest, and for other purposes," came into force January 21, 1963. A number of departments and agencies of the Government have suggested that the Department of Justice prepare and distribute a memorandum analyzing the conflict of interest provisions contained in the new act. I am therefore distributing the attached memorandum.

One of the main purposes of the new legislation merits specific mention. That purpose is to help the Government obtain the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government. For the most part the conflict of interest statutes superseded by Public Law 87-849 imposed the same restraints on a person serving the Government temporarily or intermittently as on a full-time employee, and those statutes often had an unnecessarily severe impact on the former. As a result, they impeded the departments and agencies in the recruitment of experts for important work. Public Law 87-849 meets this difficulty by imposing a lesser array of prohibitions on temporary and intermittent employees than on regular employees. I believe that a widespread appreciation of this aspect of the new law will lead to a significant expansion of the pool of talent on which the departments and agencies can draw for their special needs.

Robert F. Kennedy,
Attorney General.

Memorandum re the Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962

INTRODUCTION

Public Law 87-849, which came into force January 21, 1963, affected seven statutes which applied to officers and employees of the Government and were generally spoken of as the "conflict of interest" laws. These included six sections of the criminal code, 18 U.S.C. 216, 281, 283, 284, 434 and 1914, and a statute containing no penalties, section 190 of the Revised Statutes (5 U.S.C. 99). Public Law 87-849 (sometimes referred to hereinafter as "the Act") repealed section 190 and one of the criminal statutes, 18 U.S.C. 216, without replacing them.[1] In addition it repealed and supplanted the other five criminal statutes. It is the purpose of this memorandum to summarize the new law and to describe the principal differences between it and the legislation it has replaced.

The Act accomplished its revisions by enacting new sections 203, 205, 207, 208 and 209 of title 18 of the

[1] Section 190 of the Revised Statutes (5 U.S.C. 99), which was repealed by section 3 of Public Law 87-849, applied to a former officer or employee of the Government who had served in a department of the executive branch. It prohibited him, for a period of two years after his employment had ceased, from representing anyone in the prosecution of a claim against the United States which was pending in that or any other executive department during his period of employment. The subject of postemployment activities of former Government officers and employees was also dealt with in another statute which was repealed, 18 U.S.C. 284. Public Law 87-849 covers the subject in a single section enacted as the new 18 U.S.C. 207.

18 U.S.C. 216, which was repealed by section 1(c) of Public Law 87-849, prohibited the payment to or acceptance by a Member of Congress or officer or employee of the Government of any money or thing of value for giving or procuring a Government contract. Since this offense is within the scope of the newly enacted 18 U.S.C. 201 and 18 U.S.C. 203, relating to bribery and conflicts of interest, respectively, section 216 is no longer necessary.

United States Code and providing that they supplant the above-mentioned sections 281, 283, 284, 434 and 1914 of title 18 respectively.[2] It will be convenient, therefore, after summarizing the principal provisions of the new sections, to examine each section separately, comparing it with its precursor before passing to the next. First of all, however, it is necessary to describe the background and provisions of the new 18 U.S.C. 202(a), which has no counterpart among the statutes formerly in effect.

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SUMMARY OF THE MAIN CONFLICT OF INTEREST PROVISIONS OF PUBLIC LAW 87-849

A regular officer or employee of the Government—that is, one appointed or employed to serve more than 130 days in any period of 365 days—is in general subject to the following major prohibitions (the citations are to the new sections of title 18):

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5. He may not receive any salary, or supplementation of his Government salary, from a private source as compensation for his services to the Government (18 U.S.C. 209).

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COMPARISON OF OLD AND NEW CONFLICT OF INTEREST SECTIONS OF TITLE 18, UNITED STATES CODE

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New 18 U.S.C. 209. Subsection (a) prevents an officer or employee of the executive branch, an independent agency or the District of Columbia from receiving, and anyone from paying him, any salary or supplementation of salary from a private source as compensation for his

[2] See section 2 of Public Law 87-849. 18 U.S.C. 281 and 18 U.S.C. 283 were not completely set aside by section 2 but remain in effect to the extent that they apply to retired officers of the Armed Forces (see "Retired Officers of the Armed Forces," *infra*).

services to the Government. This provision uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance. The remainder of section 209 is new.

Subsection (b) specifically authorizes an officer or employee covered by subsection (a) to continue his participation in a bona fide pension plan or other employee welfare or benefit plan maintained by a former employer.

Subsection (c) provides that section 209 does not apply to a special Government employee or to anyone serving the Government without compensation whether or not he is a special Government employee.

Subsection (d) provides that the section does not prohibit the payment or acceptance of contributions, awards or other expenses under the terms of the Government Employees Training Act (72 Stat. 327, 5 U.S.C. 2301-2319).

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.

Nos. 88-931 and 88-938

In the Supreme Court of the United States

OCTOBER TERM, 1989

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether payments made by petitioner Boeing Company to five employees – which were made solely because the employees planned to accept positions with the Department of Defense, and which were calculated to make up the difference between the recipients' salaries and benefits with the federal government and their higher salaries and benefits with Boeing – violated the prohibition in 18 U.S.C. 209(a) against the private supplementation of the salaries of federal officials.

2. Whether the United States is entitled to recover the amount of the illegal payments either from the recipients or from petitioner Boeing, to the extent recovery against Boeing is not time-barred.

PARTIES TO THE PROCEEDINGS

The United States was the plaintiff in the district court and the appellant in the court of appeals. The defendants in the district court and appellees in the court of appeals were petitioners Boeing Company, Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-931

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-938

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 845 F.2d 476. The opinion of the district court (Pet. App 6a-29a) is reported at 653 F. Supp. 1381.

JURISDICTION

The court of appeals' judgment was entered on May 5, 1988, and petitions for rehearing were denied on September 7, 1988 (Pet. App. 30a-31a). The certiorari petitions in No. 88-931 (Individ. Pet.) and No. 88-938 (Boeing Pet.) were filed on December 5 and 6, 1988, and were granted on April 3, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the certiorari petition in No. 88-938.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 209(a) and 18 U.S.C. 1914 (1958) are reproduced at App., *infra*, 1a-2a.

STATEMENT

In 1981 and 1982, petitioner Boeing Company, a large defense contractor, paid a total of $485,000 to five of its employees, petitioners Melvyn Paisley, T.K. Jones, Herbert Reynolds, Harold Kitson, and Lawrence Crandon. The payments were made solely because the recipients planned to accept responsible positions in the Department of Defense, and they were calculated to make up the difference between the federal salary and benefits the recipient would earn while in government and the higher salary and benefits he would have earned if he had remained with Boeing, as well as to defray other expenses incurred in accepting the positions. The court of appeals held that the payments violated 18 U.S.C. 209(a), which bars private supplementation of the salaries paid by the United States for its employees' services, and that the United States is entitled to recover the amount of the payments in this civil action.

1. The record establishes that the payments at issue were made by Boeing to the five individual petitioners only because they had been selected for high-level positions in the Department of Defense, and in each case the payment was made immediately before or after the recipient began federal service.[2]

[2] *Melvyn R. Paisley*. On or about May 1981, petitioner Paisley was offered and agreed to accept the position of Assistant Secretary of the Navy for Research, Engineering and Systems. Boeing Exh. [BX] 50 (C.A. App. 253); J.A. 239-240. In July 1981, Paisley was retained as a consultant in the Department of Defense. DX 58, 67; J.A. 238-239. On September 30, 1981, Paisley accepted a $183,000 payment from Boeing. BX 50 (C.A. App. 255). After Senate confirmation, Paisley took the oath of office on December 2, 1981. DX 59 (C.A. App. 101); J.A. 236, 239.

Lawrence Crandon. In 1981, petitioner Crandon agreed to Boeing's submission of his name to be a United States member of the NATO Air Command and Control Systems team. BX 50 (C.A. App. 291). On November 25, 1981, Crandon was notified that he had been selected, subject to security clearances and physical examinations. Crandon Exh. 4 (C.A. App. 115); J.A. 239. He accepted a $40,000 payment from Boeing on March 5, 1982, and commenced service three days later. BX 50 (C.A. App. 295, 299).

Thomas K. Jones. Petitioner Jones was urged by Defense Department officials in early 1981 to consider accepting the position of Deputy Under Secretary of Defense, and he notified them in March 1981 that he was willing to do so. BX 50 (C.A. App. 240). Jones accepted a payment of $132,000 from Boeing on May 15, 1981 (C.A. App. 243), and he was appointed on June 1, 1981, to the position of Deputy Under Secretary of Defense, Strategic & Space Systems. DX 19 (C.A. 99); J.A. 236, 237, 239.

Herbert K. Reynolds. In May 1981, petitioner Reynolds was asked by the Under Secretary of Defense to consider accepting the position of Deputy Director of Space and Intelligence Policy in the Office of the Under Secretary of Defense. On June 1, 1981, he notified Department officials that he was willing to do so. Reynolds accepted a payment of $80,000 from Boeing by check dated July 22, 1981. BX 50 (C.A. App. 267, 270). Four days later, on July 26, 1981, Reynolds was appointed as a consultant to the Department of Defense (DX 115 (C.A. App. 143); J.A. 236, 238), and he was formally appointed by the President in October 1981. BX 50 (C.A. App. 267).

Harold Kitson, Jr. In March 1982, petitioner Kitson was asked by the then-Assistant Secretary of the Navy, petitioner Paisley, if he was interested in the position of Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence. In April or May of that year, Kitson requested that his name be submitted. GX 127, at 19-22 (C.A. App. 898-899); J.A. 188. On July 6, 1982, Kitson was appointed as a consultant in the Department of the Navy, pending his formal appointment to office. DX 135 (C.A. App. 108); J.A. 238-239. On July 27, 1982, Kitson accepted a $50,000 payment from Boeing. BX 50 (C.A. App. 282). On September 1, 1982, he was appointed Deputy Assistant Secretary. DX 143 (J.A. Lodging No. 25).

The payments were designed to induce or facilitate the recipient's acceptance of the federal position. J.A. 288-289, 290-291, 304, 317-318, 329; see also GX 122, at 21-22 (C.A. App. 602); GX 121, at 108 (C.A. App. 724); J.A. 116.[3] During the preceding 20-year period, the only persons to whom Boeing of-

[3] A document signed by the Executive Vice President of Boeing Aerospace Company stated that the payment to petitioner Jones was "conditional on" Jones' "acceptance of the job" (J.A. Lodging No. 14). An internal Boeing document expressed doubts that the Senate would give its consent to Paisley's appointment and suggested that a "memo of understanding" be executed to cover a situation in which Paisley would take the payment but then retire rather than go into government service (J.A. Lodging No. 16). Similarly, a Senior Vice President of Boeing recommended a payment to Paisley only "if Paisley ends up as a govt official or as consultant" (J.A. Lodging No. 15).

fered such payments were those – 16 in all – who left the Company to accept positions of responsibility with the United States Government, typically in the Department of Defense or the National Aeronautices and Space Administration (NASA).[4]

The circumstances of the payments also demonstrate that they were calculated to make up the difference between the recipient's federal salary and his higher Boeing salary and to defray other costs associated with accepting the government position. Each of the individual petitioners submitted to Boeing a written calculation of the projected reduction in his income over the expected period of his government employment. In monetary terms, the vast majority (and in some cases all) of the submissions consisted of (1) the difference between the salary and benefits he expected to realize for the duration of his federal position (identified in each case as the time remaining in the first Administration of President Reagan) and the higher salary and benefits he would have realized if he had stayed with Boeing, and (2) additional expenses he would incur in moving to and living in the Washington, D.C., area, such as moving expenses, house-hunting or rental costs, and higher state taxes and cost of living as compared with Seattle. Some of the petitioners also included in their submissions an estimate of the cash

[4] The positions were: Office of Director of Defense Research & Engineering (1962); Director of Advance Systems Studies, NASA (1963); Scientific Advisor, DCS/Research & Development, U.S. Air Force (1966); Deputy Associate Administrator for Engineering, Office of Space, Sciences & Applications, NASA (1967); Assistant Director, Strategic Systems, Office of the Director of Defense Research & Engineering (1968); Staff Leader of Aeronautical Research, National Aeronautics & Space Council, Office of the President (1970); Technical Assistant, Strategic & Space System Department, Research & Engineering, Department of Defense (DoD) (1971); Director of Army Aviation Research Laboratories, Lewis Directorate, U.S. Army (1971); Technical Director, Naval Air Development Center (1972); Aeronautical & Space Science Committee, U.S. Senate (1973); Assistant Secretary of Commerce for Science & Technology (1973); Air Force Systems Command, DoD (1973); Assistant Secretary of the Air Force (1973); Staff Specialist, DoD SALT Task Force (1975); Deputy Director, Office of Director of Defense Research & Engineering (1975); Director, Cruise Missile Program, DoD (1978) (moved aborted). J.A. Lodging No. 20.

value of unused accrued leave, the accrued but unvested Company contributions to a corporate savings plan, and stock options that had been granted but were not yet exercisable. No other departing employee was entitled to the value of these benefits. J.A. 369-371. Moreover, in each case, the amounts requested for these accrued but unvested items represented a relatively small portion of the overall payment the individual sought. See generally J.A. Lodging Nos. 10 (Jones), 11 (Paisley),[5] 12 (Reynolds), 13 (Kitson); J.A. 526-529 (Crandon).

Boeing relied on similar considerations in its calculation of the severance payments. Charles P. Hagberg, Boeing's Assistant Director for Corporate Compensation, testified that the Company calculated the "severance" pay for each of the five individual petitioners as the sum of four factors: (1) the difference between his Boeing and federal salaries over the projected term of his federal employment, (2) the amount the Company would have contributed to two investment plans during the expected period of government employment if petitioners had remained at Boeing, (3) the cost of moving to Washington, D.C., and (4) the difference in the cost of living between Seattle and Washington. J.A. 366-375. See also J.A. 280-283 (June 17, 1982, description of Boeing policy for payments "to employees who would suffer substantial loss in salary and/or benefits by accepting Government employment and who are approved for participation by the Chief Executive Officer.").

The initial application of the four-factor test to each petitioner was made by the Industrial Relations Department in the Boeing Aerospace Company, the division of petitioner Boeing that employed each of them. See J.A. Lodging Nos. 5 (Paisley), 6 (Jones), 7 (Reynolds), 8 (Kitson), 9 (Crandon). Mr. Hagberg thereafter verified the calculations. J.A. 413-414. The President of Boeing Aerospace, Henry K. Hebeler, also reviewed the calculations. J.A. 326-327. Relying on the judgment of the

[5] Petitioner Paisley's calculation was based on the assumption that he would terminate his employment with Boeing. Ultimately, however, Paisley retired, and like retiring employees generally, he received the nonvested portion of the Company's contributions to the investment plan. J.A. 418-419.

Industrial Relations Department, Mr. Hebeler made written recommendations to petitioner Boeing's Senior Vice President, Clyde Skeen, and its Vice President for Industrial and Public Relations, Stanley M. Little, that the amounts be paid as proposed. J.A. 274-279, 284; J.A. Lodging Nos. 2, 15, 17, 18.[6]

Mr. Little, who knew how the payments were calculated (GX 121 (J.A. 310-313, 316-318; C.A. App. 689-690, 706, 728-729); J.A. 188), reviewed the recommendations of Mr. Hebeler and the Industrial Relations Department with T.A. Wilson, petitioner Boeing's chief executive officer. J.A. 308-309. Mr. Wilson knew that the calculations included the difference between each employee's Boeing salary and prospective government salary, as well as moving expenses. J.A. 288-290. Mr. Wilson was not acquainted with several of the individuals (J.A. 287-288)—or, therefore, with their past services to Boeing—and he had no information presented to him other than the Industrial Relations Department's calculations and recommendations. Mr. Wilson made no change in the amounts recommended for Jones, Reynolds, Kitson or Crandon. He did conclude that the proposed payment of $220,536 to Paisley was too high, and the Industrial Relations Department reduced the figure to the present value in 1981 of receiving $220,536 over four years, using a discount rate of 12%. The resulting figure of $180,064 was rounded to

[6] Petitioners Kitson and Crandon received payments in 1982, after Boeing charged the payments to Paisley, Jones and Reynolds to the government as "overhead" expenses on Boeing's defense contracts and the Defense Contract Audit Agency questioned the legality of those charges. For Crandon and Kitson, the Industrial Relations Department calculated the proposed payment under both the four-factor approach and an alternative approach, which multiplied 5% of the individual's years of service with Boeing (1) by his current salary, and then (2) by a fraction consisting of the number of years the employee expected to remain in the government over four. See J.A. 282-283. The most significant factor in the alternative calculation was the number of years that the employee expected to remain in the government. The four-factor approach for Kitson yielded a figure of $59,310, and the alternative approach yielded a figure of $34,912. He was paid $50,000. The four-factor approach for Crandon yielded a figure of $52,260, and the alternative approach yielded a figure of $19,311. He was paid $40,000. J.A. Lodging Nos. 8, 9.

$180,000 and then approved. J.A. 382-385; J.A. Lodging No. 5.[7] Each individual petitioner also received a separate check for the amount of his *vested* benefits, to which any departing Boeing employee was entitled (Pet. App. 4a).

2. The United States brought this civil action, alleging that the payments violated 18 U.S.C. 209(a) and seeking disgorgement of the payments by the individual petitioners and damages from Boeing in an equivalent amount. The district court granted judgment in favor of petitioners (Pet. App. 16a-29a). The court first held that Section 209(a) does not prohibit any supplementation of a federal salary that is paid prior to the formal onset of the recipient's government employment (*id.* at 25a, 26a). The court further held that the payments were not unlawful under Section 209(a) because, as the court saw it, they were intended to "sever the relationship" between Boeing and its employees, not to supplement their government salaries or compensate them for their government service (*id.* at 20a, 26a). The court accepted the government's proof that the challenged payments were made by Boeing to induce the recipients to accept federal employment and to bridge the disparity between private and public salaries and benefits; that Boeing made such payments solely to persons leaving the Company for federal employment; and that the payments were intended by Boeing as the equivalent of the "paid leave" it granted to employees who work for a state or local government (*id.* at 17a-18a, 26a). But the court concluded that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (*id.* at 26a).

The district court also ruled that the United States could not in any event recover damages in the amount of payments made in violation of Section 209(a) without showing actual corruption on the part of Boeing or the individual petitioners, which it had not proven (Pet. App. 28a). Finally, in the court's view, such

[7] Subsequently, an additional $3000 was approved for petitioner Paisley, based on the difference between the Boeing salary he would have earned and the pay that he received as a government consultant while awaiting Senate confirmation. GX 111, Nos. 100165, 100429; J.A. 190, 194-195.

payments could not be recovered unless they were "secret," and it believed that the individual petitioners had made sufficient disclosure of the payments to certain employees of the Department of Defense (*id.* at 27a).[8]

3. The court of appeals reversed (Pet. App. 1a-15a). It first held, contrary to the district court's view, that payments made prior to the onset of federal service are within the reach of Section 209(a) (Pet. App. 6a-7a). The court noted that prior to 1962, the predecessor statute applied to "[w]hoever, being a Government official or employee," received a supplementation of salary (18 U.S.C. 1914 (1958)), but that Congress deleted the phrase "being a Government official or employee" when it enacted the present 18 U.S.C. 209 in 1962. The court also found this interpretation supported by the policies underlying Section 209 and the conflict-of-interest laws generally, which establish "rigid rules of conduct" to prevent activities that " 'arouse suspicions of malfeasance and corruption' " (Pet. App. 6a-7a). The court explained that "[l]arge severance payments by defense contractors to those going to work at high levels in the Defense Department certainly 'arouse suspicions,' and those suspicions are not reduced by making the payments just before government service begins" (*id.* at 7a).

The court of appeals rejected the view that Section 209(a) states an objective standard of conduct and requires no showing of intent, since Section 209(a) prohibits payments made "as compensation for" the recipient's federal services (Pet. App. 7a). However, the court found that the record established "com-

[8] The district court held that the government's claims against Boeing based on four of the five payments were barred by the three-year statute of limitations in 28 U.S.C. 2415(b) for actions founded upon a tort (Pet. App. 29a). The claims against the individual petitioners are governed by the six-year statute of limitations in 28 U.S.C. 2415(a) for actions founded upon a contract, and therefore were not time-barred. The court of appeals affirmed these rulings by the district court, but held that the United States may not recover the full amount of the payment to Kitson, for which recovery from Boeing is not time-barred, from both Boeing and Kitson (Pet. App. 10a-12a). Petitioners do not challenge the court of appeals' holding that the United States' claims are not time-barred to this extent.

pensatory intent," and that the district court's contrary finding was clearly erroneous (*id.* at 8a). The court relied on four factors. First, the recipients and Boeing personnel officials "calculated salary, benefits and cost-of-living differences over the expected term of government employment," and the Chairman of Boeing, who approved the payments, "received a recommendation and was aware of the factors used to reach that figure" (*ibid.*). Second, "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*ibid.*). Third, Boeing's parallel policy of providing paid leave for its employees who work for a state or local government "suggests that payments to federal employees were designed to do the same thing without technically violating § 209" (*ibid.*). Fourth, the fact that only 21 such payments were made over the preceding 25 years, and only to persons entering high-level government positions, "suggests an intent to supplement the federal salaries of a limited number of employees" (*ibid.*).

The court of appeals rejected petitioners' contention that the government was not injured, and that the individual petitioners therefore were entitled to retain the payments, because they did not result in an actual conflict of interest. The court explained that this argument "ignores the preventive nature of the conflict of interest laws," under which "the appearance of conflicts rather than actual conflicts or corruption is all that is necessary" (Pet. App. 8a-9a). In this case, the court concluded, "[t]he appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption" (*id.* at 9a).

Finally, the court rejected petitioners' argument, based on common-law principles, that only "secret" profits give rise to a conflict of interest. The court reasoned that this suit is based on the statutory rule prescribed by Section 209, which is not limited to secret payments (Pet. App. 9a). Moreover, the court noted that even under the common law, effective disclosure must be "formal, complete, and directed to the proper parties" (*ibid.*). Here, because the individual petitioners' financial-reporting forms revealed only their total income from Boeing, without

separately identifying severance payments, the court concluded that any disclosures were "not sufficiently complete to insulate the payments from the conflict of interest laws" (*ibid.*).[9]

SUMMARY OF ARGUMENT

I.A. The prohibition in 18 U.S.C. 209 against private supplementation of federal salaries was first enacted in 1917 (see 18 U.S.C. 1914 (1958)) and was revised and reenacted as part of the comprehensive revision of the conflict-of-interest laws in 1962. It is "directed at the crime of bribery in its open or subtle form" (*Muschany* v. *United States*, 324 U.S. 49, 68 (1945)) and embodies the principle that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States" (33 Op. A.G. 273, 275 (1922)). Accordingly, Section 209 is framed as an absolute prohibition against double compensation.

B.1. Section 209(a) bars a person from receiving any privately paid salary or "supplementation of salary, as compensation for his services as an officer or employee of the executive branch * * *." The "severance" payments at issue in this case constituted "supplementations of salary" within the meaning of this provision. The principal component of each payment was an amount specifically designed to compensate the recipient for the difference between his federal salary and benefits during the anticipated period of his government service and the higher salary and benefits he would have received if he had remained with Boeing. Unquestionably a payment calculated on that basis is a "supplementation" of the federal salary for purposes of Section 209. The statute is not limited to supplementations in the nature of "salary," however. The provision has consistently been construed, both before 1962 and after, to bar payment of such items as travel and moving expenses and cost-of-living allowances for federal employees. Congress declined to disturb

[9] Judge Hall dissented from the panel's holding that the payments were made and received with "compensatory intent" (Pet. App. 13a-15a). Petitioners' petitions for rehearing with suggestion for rehearing en banc were denied by a 6-5 vote (*id.* at 30a-31a).

those administrative rulings when it enacted specific exceptions to several of them in 1958 and 1979, and Congress reenacted the basic prohibition in 1962 after it had been given a broad interpretation. Against this background, the other principal components of the payments here—moving expenses and a cost-of-living allowance—also constituted illegal salary supplementations for purposes of Section 209.

2. Contrary to petitioners' contention, the absolute prohibition against double compensation cannot be circumvented simply by arranging for a lump-sum payment to be made before the recipient begins work. The prohibition applies to "[w]hoever" receives "any" supplementation of salary for services rendered as a federal official; that all-encompassing language does not require that the recipient actually be in office at the time of payment or exclude certain supplementations based on their timing. The former Section 1914 applied to "[w]hoever, being a Government official or employee," but even with that limiting language it was understood by the Department of Justice and commentators to apply to severance payments made prior to the commencement of federal service. Significantly, moreover, that phrase was deleted from the statute in 1962, when Congress also deleted a virtually identical phrase in a related conflict-of-interest statute for the specific purpose of reaching payments made prior to the commencement of federal service. The policies of the prohibition likewise support this interpretation, because, as in the case of a bribe, an advance payment can be presumed to have a lingering effect on the recipient when he performs his official duties. Nor can an interpretation permitting private lump-sum payments for the recipient's federal services be justified by the need to attract qualified personnel to government, because Congress has enacted express exceptions when it concluded they were necessary.

3. The payments at issue here also constituted "compensation for" the recipients' federal services within the meaning of Section 209. The background and legislative history of that phrase show that it is intended to describe the requisite nexus between the payment and the services. In particular, Section 209 and its predecessor have been consistently construed to bar payments that were avowedly designed as supplementations of federal salary or that singled out federal employees for special

treatment. The undisputed evidence and factual findings by the district court establish that the payments at issue here had both of those characteristics, since Boeing offered "severance" payments only to persons entering federal service and based them on the financial losses the recipients would experience as a result. For these reasons, and because the payments were intended to induce the recipients to accept positions in a Department in which Boeing is substantially interested, the payments, by definition, constituted "compensation for" the recipients' federal service. This conclusion conforms to the consistent views of the Department of Justice, the Office of Government Ethics, and the leading commentators.

Section 209 does not require a showing of specific intent to supplement federal salaries as compensation for federal services; it is sufficient to show that the defendant knowingly made or received a payment having characteristics that rendered it unlawful under this settled construction of the statute. In any event, the district court's finding that petitioners did not act with "compensatory intent" was clearly erroneous.

II. The United States has a civil cause of action to require the recipients to disgorge the illegal payments or to recover damages from Boeing. Petitioners are not excused from liability in such an action on a waiver theory based on alleged disclosures of the payments to government officials on the recipients' financial-reporting forms. Section 209 does not authorize an administrative waiver, and the regulations governing the financial-disclosure program expressly provide that the filing of a report does not serve to exempt an employee from any substantive restrictions. There is no factual basis for petitioners' waiver argument in any event, because the recipients did not list their "severance payments" as such on their disclosure forms.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT BOEING'S PAYMENTS TO THE INDIVIDUAL EMPLOYEES VIOLATED 18 U.S.C. 209(a) AND THAT THE UNITED STATES IS ENTITLED TO RECOVER THE AMOUNT OF THE PAYMENTS

Section 209(a) of Title 18 establishes a broad prohibition against private supplementation of the salary a federal employee is paid for his services to the United States. The payments at

issue in this case were classic violations of that prohibition: they were made solely because the recipients planned to assume positions in the Department of Defense; they were calculated to make up the difference between the recipients' government salaries and their higher Boeing salaries, as well as to defray other expenses incurred in accepting government employment; and they were intended to encourage the recipients to accept that employment by mitigating the resulting financial sacrifices. The court of appeals' holding that such payments violate Section 209(a) is supported by the text and legislative history of the statute and the views of the commentators who were intimately involved in its enactment. That holding also is consistent with the advice given by the Department of Justice to other agencies and prospective appointees for many years. The court below therefore correctly held that the individual petitioners must disgorge the illegal payments and that, in the alternative, the United States may recover the amount of the payments from Boeing, to the extent recovery is not time-barred.

We do not contend that all "severance" payments made by a private employer to an individual entering federal service are prohibited by Section 209(a). The typical severance payment, which is made in consideration of past services to the employer and which does not take account of the anticipated future employment of the recipient, is not barred by Section 209(a)—especially if made pursuant to a pre-existing policy applicable to departing employees generally. Although such a payment may have the effect of "supplementing" the recipient's federal salary in the sense that it will be available during the period of his federal service, the payment is not made in consideration of—"as compensation for"—that federal service. But where, as here, the "severance" payment is made only because the recipient plans to accept a position with the federal government and the payment is calculated to compensate for the lower federal salary and other financial sacrifices associated with federal employment, Section 209(a) squarely applies. Such a payment is made, not as compensation for the recipient's past services to the private employer, but as compensation for his future services to the United States.

I. THE PAYMENTS AT ISSUE VIOLATED 18 U.S.C. 209(a)

A. Section 209(a) Broadly Prohibits Outside Compensation In Order To Assure The Independence and Undivided Loyalty Of Government Officials

The long history of the prohibition against private supplementation of salaries paid to federal employees for the performance of their official duties demonstrates a firm congressional purpose to assure the independence and undivided loyalty of government employees.

1. Section 209(a) was enacted in 1962 as part of the comprehensive revision of the conflict-of-interest laws made by Pub. L. No. 87-849, 76 Stat. 1119, 1125. It carries forward the basic prohibition against outside compensation contained in 18 U.S.C. 1914 (1958), which was enacted by Section 1 of the Act of March 3, 1917, ch. 163, 39 Stat. 1106.

The 1917 provision was enacted in response to the practice of substantial payments by private foundations to supplement the federal salaries of individuals employed by the Bureau of Education at the rate of $1 per year. Congress was concerned that the recipients might be induced to adhere to the views of the foundations who furnished their financial support, and that the government would, as a result, be deprived of their independent judgment in matters affecting the Nation's youth.[10] Congress further concluded that the threat to the independence of government officials exemplified by the practice in the Bureau of Education was a government-wide concern, and it accordingly gave the 1917 Act a government-wide sweep. Nor was the 1917 Act limited to payments by persons who had business before the agency in which the recipient was employed. These broad features of the basic prohibition were carried forward in the

[10] See 54 Cong. Rec. 2039-2047, 4004-4006, 4010-4013, 4017, 4057-4059, 4859, 4920-4922, 4925 (1917); Memorandum for the Attorney General from Frederick W. Ford, Acting Ass't A.G., Off. Legal Counsel (OLC), Re: "Conflict of Interest Statutes," at 118-120 (Dec. 10, 1956) [1956 A.G. Mem.], *reprinted in Federal Conflict of Interest Legislation: Hearings on H.R. 1900, H.R. 2156, H.R. 2157, H.R. 7556 and H.R. 10575 Before the Antitrust Subcomm. (Subcomm. No 5) of the House Comm. on the Judiciary*, 86th Cong., 2d Sess. 619, 738-740 (1960) [*1960 Hearings*]; Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 54-55 (1960) [*N.Y. Bar Report*]; B. Manning, *Federal Conflict of Interest Law* 148-149 (1964).

present Section 209(a), which applies to the receipt and payment of "any" salary and "any" supplementation of or contribution to salary, "[w]hoever" may be the payor.[11]

Soon after the 1917 Act was passed, the Attorney General explained that the prohibition embodies the principle that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." 33 Op. A.G. 273, 275 (1922). This Court similarly observed that Section 1914 was "directed at the crime of bribery in its open or subtle form." *Muschany* v. *United States*, 324 U.S. at 68. The background of the 1962 revision of the conflict-of-interest laws demonstrates that these same purposes animated Congress's decision to retain the prohibition against outside compensation in the present 18 U.S.C. 209(a), albeit with certain modifications discussed below.

2. Congress enacted the present 18 U.S.C. 209(a) and related conflict-of-interest laws in 1962 based upon in-depth studies of the then-existing laws by the House Judiciary Committee, the Association of the Bar of the City of New York, the Executive Branch, and various commentators.[12] In 1957, Chairman Celler instructed the House Judiciary Committee staff "to prepare a detailed study and analysis of existing Federal conflict-of-interest laws to the end that they might be revised,

[11] See Manning, at 156-157 ("It must be emphasized that the statute forbids outside compensation even if the payor has no dealings or relations whatever with the government and no special interest in its policies. It is not limited in its application to compensation paid by a source in a sensitive relationship with the government employee's agency—a supply contractor dealing with the agency, for example."); Accord, Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137 (1963).

[12] Congress extensively relied on the congressional staff and Bar Association studies and the views of leading commentators when it revised the conflict-of-interest laws in 1962, and those materials therefore are a reliable source of guidance in construing Section 209. Because petitioners contend that this case involves a novel application of the statutory prohibition that they could not have anticipated, the statutory background and publications of authoritative commentators have special relevance here. This Court has examined studies and commentary submitted to Congress over a period of years to inform its interpretation of Congress's enactments. See, *e.g.*, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 409-412 (1985); *Lowe* v. *SEC*, 472 U.S. 181, 190-202 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226, 229-233 (1983); *ICC* v. *New York, N.H. & H. R.R.*, 372 U.S. 744, 753-758 (1963).

simplified, and coordinated" (H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961) [House Report]). The resulting report recommended that Congress retain the prohibition against supplementation of federal salaries, with certain revisions. Staff of Subcomm. No. 5 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 44-46, 61-63 (Comm. Print 1958) [*Staff Report*]. Based on a review of the background of 18 U.S.C. 1914 (1958) and the precedents construing it, the *Staff Report* explained (at 44) that the prohibition rests on the premise that when a government employee receives outside compensation for his government work, "his impartiality may become impaired, not only in direct transactions with that employer on behalf of the Government, but also with respect to general policies espoused by the private employer." For this reason, the report stressed, the provision "is framed as an absolute prohibition against double compensation" (*ibid.*, citing McElwain & Vorenberg, *The Federal Conflict of Interest Statutes*, 65 Harv. L. Rev. 955, 966-967 (1952)). Echoing that view, the Judiciary Committee's Report on the bill enacted in 1962 explained that the provision "seeks to avoid divided loyalty of Government officials by prohibiting private compensation of Government services" (House Report 6).

Congress's revision of the governing laws in 1962 also was based on its consideration of what the House Report described as "[a] penetrating 2-year study of the operation of the Federal conflict-of-interest statutes undertaken by a special committee on conflict of interest laws of the Association of the Bar of the City of New York." House Report 8; see also S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962) [Senate Report]. The Bar Association's report elaborated upon the purposes of the prohibition against outside compensation (*N.Y. Bar Report* 211-212):

> The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration.

In light of these broad prophylactic purposes, the Bar Association likewise described the prohibition in absolute terms: "In the strictest sense, Section 1914 is a conflict of interest statute. The employee does not have to *do* anything improper in his office to violate the statute. His receipt of the outside salary for his government work, coupled with his status as a government employee, is all that is required" (*N.Y. Bar Report* 55).

The responsible congressional committees conducted extensive hearings in 1960, 1961 and 1962 on bills that incorporated the recommendations of the Judiciary Committee staff and the New York City Bar Association. See *1960 Hearings*; *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412 and H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) [*1961 Hearings*]; *Conflicts of Interest: Hearing on H.R. 8140 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) [*1962 Hearing*].[13] The 1962 revision of the conflict-of-interest laws,

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[13] President Kennedy appointed a special committee to study the conflict-of-interest laws in the spring of 1961, and he sent a message to Congress on the subject on April 27, 1961. H.R. Doc. No. 145, 87th Cong., 1st Sess. (1981). The President also transmitted a proposed bill to implement that message, which was introduced as H.R. 7139, 87th Cong., 1st Sess. (1961). House Report 8; *1961 Hearings* 21-25, 30-32, 57-63. Congress also had before it an extensive study of the conflict of interest laws (including 18 U.S.C. 1914 (1958)) undertaken by OLC in 1956 (see 1956 A.G. Mem., note 10, *supra*), as

including 18 U.S.C. 209, largely incorporated those recommendations, taking into account as well the views of the Executive Branch and commentators (see note 13, *supra*).[14]

Thus, in enacting 18 U.S.C. 209, Congress reaffirmed the fundamental importance of what the court of appeals termed the "rigid rules" against private supplementation of the salaries paid to government officials for their services to the United States. Those rules serve to preserve both the actual independence and undivided loyalty of government officials and the public's faith in those virtues, which are essential to " 'the very fabric of a democratic society' " (Pet. App. 6a-7a, quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).[15] These concerns are directly implicated in this case, because, as the court of appeals observed, "[l]arge severance payments by defense contractors to those going to

well as studies of Section 1914 and other conflict-of-interest laws by a number of commentators. See *Staff Report* 44 nn. 254 & 256, citing McElwain & Vorenberg, 65 Harv. L. Rev. at 966-967, and Dembling & Forrest, *Government Service and Private Compensation*, 20 Geo. Wash. L. Rev. 174, 193 (1952); 1956 A.G. Mem. (*1960 Hearings* 747-749), quoting Davis, *The Federal Conflict of Interest Laws*, 54 Colum. L. Rev. 893, 905-907 (1954).

[14] On May 19, 1958, "based upon the[] recommendations" in the *Staff Report*, Representative Celler introduced H.R. 12547, 88th Cong., 2d Sess. That bill was reintroduced in the next Congress as H.R. 2156, 86th Cong. 1st Sess. (1959), and the Subcommittee's *1960 Hearings* focused in large part on the latter bill. The recommendations of the New York City Bar Association were embodied in H.R. 10575, 86th Cong., 2d Sess. (1960), which was introduced by Representative Lindsay. The Subcommittee received extensive testimony from Roswell Perkins, the Chairman of the Bar Association's special committee. House Report 7-8; *1960 Hearings* 383-483; *1961 Hearings* 100-132; see also *1962 Hearing* 42-52. H.R. 10575 was reintroduced in 1961 as H.R. 3050, 87th Cong., 1st Sess. In that same year, Representative Celler introduced H.R. 3411, 87th Cong., 1st Sess., which was based on both the *Staff Report* and the Bar Association's proposals. The bill enacted into law in 1962 (H.R. 8140, 87th Cong., 2d Sess.) was a composite that included provisions of both those proposals. *1962 Hearing* 36 (remarks of Rep. Lindsay).

[15] Compare *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976):

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

work at high levels in the Defense Department certainly 'arouse suspicions' " (Pet. App. 7a)—just as private supplementation of salaries in the Bureau of Education aroused suspicion in 1917 and led to enactment of the prohibition now contained in Section 209(a). As we now show, the text and legislative history of Section 209 demonstrate that petitioners violated that statute.

B. Boeing's Payments Supplemented The Individual Petitioners' Federal Salaries And Constituted Compensation For Their Federal Services

1. *The Payments Were "Supplementations Of Salary" Within The Meaning Of Section 209(a)*

Section 209(a) bars the receipt of "any salary, or any contribution to or supplementation of salary, as compensation for [the recipient's] services as an officer or employee of the executive branch * * * from any source other than the Government of the United States * * *."[16] The payments at issue in this case violated the explicit terms of this provision.

a. The principal purpose and effect of the severance payments in this case was to make up some or all of the difference between the recipient's federal salary and benefits and the higher salary and benefits he would have earned if he had remained with Boeing. This much is evident from the fact that a salary and benefit differential was the principal component of the calculations prepared by both the individual petitioners and Boeing. See pages 4-7, *supra*. There can be no doubt that a payment resting on that rationale constitutes a "supplementation" of the recipient's federal salary for purposes of 18 U.S.C. 209(a). The New York City Bar Association, for example, stated in its 1960 report with respect to the prior Section 1914: "Clearly the appointee's former employer cannot under this section make up the difference between his former salary and his government salary." *N.Y. Bar Report* 65. There is no indication that Congress departed from that central principle when it enacted Section 209 in 1962. To the contrary, Roswell Perkins, Chairman of the Bar Association's special committee and the leading con-

[16] Section 209(a) exempts amounts "contributed out of the treasury of any State, county, or municipality." This exception was included to preserve agricultural extension and similar programs. Manning, at 172.

temporary commentator on the conflict-of-interest laws,[17] explained immediately thereafter that "[t]he most important application of the outside compensation prohibition is the typical case where a corporate executive is asked to go to Washington, and his corporation offers to pay all or part of the difference between his present salary and his future government salary." Perkins, 76 Harv. L. Rev. at 1137-1138; Petrowitz, *Conflict of Interest in Federal Procurement*, 29 Law & Contemp. Probs. 196, 209 n.48 (1964) (same).

b. The other components of the payments at issue here also are "supplementation[s] of salary" within the meaning of Section 209(a). The quoted phrase has not been construed to limit the prohibition to payments in the nature of "salary," narrowly defined—*i.e.*, a "fixed annual or periodical payment for services" (*Benedict* v. *United States*, 176 U.S. 357, 360 (1900)). It has been applied to virtually all transfers of economic value that are made because of the recipient's federal service. This construction was firmly established prior to the enactment of Section 209(a) and was carried forward in that provision.

The language of 18 U.S.C. 1914 (1958) was somewhat unclear with respect to the type of payments that a federal employee could not receive. This ambiguity resulted from the fact that although the second paragraph of Section 1914, which stated the *payor's* offense, applied to any person who "makes any contribution to, or in any way supplements the salary of," a government official, the first paragraph, which stated the *payee's* offense, applied to any government official who "receives any salary in connection with his services." Because the first paragraph applied only to the receipt of "salary," it might have been argued that a federal employee would not violate the law if he received items of monetary value that were not in the form of "salary" in the narrow sense. See Davis, 54 Colum. L. Rev. at 904 n.56. Nonetheless, in 1956, the Comptroller General had

[17] Roswell Perkins was regarded by Members of Congress as a leading expert on the conflict-of-interest laws. Senator Keating stated that "[t]here is probably no one better informed person on this subject" (*1962 Hearing* 37), and Representative Lindsay described him as the "author of 80 percent of the House bill" and stated that his committee's report was "probably the leading work on the subject of conflicts of interest in the Federal branch that has been written to date" (*id.* at 35).

construed the first paragraph of Section 1914 to bar a federal employee from accepting tuition, travel, and living expenses for a training program he attended in his official capacity. 36 Comp. Gen. 156 (1956). The Comptroller General also had construed the second paragraph of Section 1914 to bar a broad range of payments to a federal employee, such as travel and living expenses and special allowances to compensate for the higher cost of living in his place of employment.[18] See *N.Y. Bar Report* 64 ("salary" in Section 1914 "has been, and probably will be, construed to include almost any kind of a transfer of value to the employee that smacks of compensation").

In response to the Comptroller General's opinions construing Section 209(a) to bar outside payment of expenses incident to a federal employee's participation in a training program, Congress enacted an exception in the Government Employees Training Act of 1958 permitting such expenses to be paid by private parties, but only in carefully limited circumstances—namely, where the payor is a non-profit organization exempt from taxation under 26 U.S.C. 501(c)(3). See § 19, 72 Stat. 336; H.R. Rep. No. 1951, 85th Cong., 2d Sess. 6, 12-13 (1958). Congress did not disturb the general prohibition in 18 U.S.C. 1914 (1958), as construed by the Comptroller General, against the private payment of such expenses in all other circumstances. Compare *Public Employees Retirement System* v. *Betts*, 109 S. Ct. 2854, 2861 (1989). An identical exception was included in Section 209 itself when Congress revised the conflict-of-interest laws in 1962, thereby reaffirming that any payment of expenses incurred by a federal employee incident to his employment is barred, even if it does not take the form of a periodic "salary." 18 U.S.C. 209(d); 5 U.S.C. 4111(a).

Moreover, when Congress enacted Section 209(a) in 1962, it revised the language of both paragraphs of the former Section 1914 in order expressly to prohibit the receipt as well as the pay-

[18] See 2 Comp. Gen. 775 (1923) ("salary and expenses"); 18 Comp. Gen. 460 (1938) (travel expenses incident to employee's detail to foreign country); 26 Comp. Gen. 15 (1946) (cost-of-living allowance); 35 Comp. Gen. 639 (1956) (cost-of-living allowance); see generally Manning, at 161.

ment not only of "salary," but also any "supplementation of" or "contribution to" salary. This change was based on a recommendation in the *Staff Report* (at 62), which explained that it would make "clear that the receipt of lump-sum payments, which supplement salary although they may not themselves constitute salary, are also forbidden." *Id.* at 61; see also House Report 13, 24; *1960 Hearings* 182, 207. Thus, Section 209(a) carried forward the broad scope of the prior Section 1914 with respect to the types of cash payments and other transfers of value that are barred. Manning, at 162-163;[19] Perkins, 76 Harv. L. Rev. at 1138-1139, 1141 & n.93. Compare *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

c. The foregoing interpretation is confirmed by subsequent events with respect to one of the components of the severance payments at issue in this case—moving expenses. In 1979, Congress amended Section 209 to permit a private employer to pay relocation expenses in only one narrow situation: where the recipient is a participant in a special interchange or fellowship program established by statute or Executive Order that offers appointments for a period of not to exceed one year. See 18 U.S.C. 209(e), as amended by Pub. L. No. 96-174, 93 Stat. 1288. The legislative history shows that this amendment was enacted in response to an opinion of the Office of Legal Counsel that payment of an individual's moving expenses because he is entering federal service violates Section 209(a). H.R. Rep. No. 674, 96th Cong., 1st Sess. 2, 5, 6, 8 (1979); see 2 Op. O.L.C. 267 (1978) (App., *infra*, 3a-8a).[20] In carving out the special exception in 18 U.S.C. 209(e), Congress left undisturbed the general prohibition in Section 209(a), as construed by OLC, against reimbursement of the moving expenses of a person

[19] Professor Manning, of the Yale Law School, was the Staff Director of the New York City Bar Association's study of the conflict-of-interest laws (*N.Y. Bar Report* viii) and served on the special committee appointed by President Kennedy in 1961 to study those laws (H.R. Doc. No. 145, at 2).

[20] Section 1914 was understood to prohibit payment of moving expenses as well. See *1961 Hearings* 63.

entering government service. See 5 Op. O.L.C. 150, 150-151 (1981) (App., *infra*, 9a-11a) (payment of moving expenses violates Section 209(a) if made because of recipient's federal service, rather than past service to payor). Compare *Betts*, 109 S. Ct. at 2861. It therefore is especially clear that the portion of each payment here that is attributable to the recipient's expenses in moving to Washington, D.C., violated Section 209(a).

Furthermore, the legislative history of the 1979 amendment makes clear that, even in the special context of a short-term Presidential interchange program, the exception permitting payment of relocation expenses does not overcome the general prohibition Congress perceived in Section 209(a) against private payment of a federal employee's "personal living expenses" (H.R. Rep. No. 674, at 2-3). This legislative history confirms that the payments here also violated Section 209(a) to the extent they were designed to reimburse the recipients for a portion of their personal living expenses—specifically, the portion that compensated for the higher cost of living in Washington, D.C. In sum, all of the principal components of the severance payments at issue in this case were illegal "supplementations" of the recipients' federal salaries.[21]

2. *Section 209(a) Does Not Exempt Supplementations Of Salary Made Prior To The Commencement Of Federal Service*

In light of the text and legislative history of Section 209(a), petitioners do not seriously dispute that the various types of payments just discussed are prohibited as a general matter.

[21] The calculation of the proposed severance payment by both Boeing and the recipients also took into account the value of unvested portions of past contributions by Boeing to the individual petitioners' accounts under the Company's Voluntary Investment Plan. The unvested portion ordinarily is forfeited when an employee leaves the Company. See pages 4-5, *supra*. Accordingly, the inclusion in the severance payments of an amount attributable to that unvested portion was indistinguishable for present purposes from any other transfer of economic value made solely to reduce the financial hardship of accepting a federal position, rather than to compensate for past services to the payor. It therefore constituted a "supplementation" of the recipient's federal salary within the meaning of Section 209(a).

The individual petitioners do argue (Br. 18-32), however, that Section 209(a) can be avoided simply by combining those payments, characterizing the total as a "severance payment," and arranging for it to be made before the recipient begins his federal employment. See also Boeing Br. 19 n.9. The text, legislative history, and purposes of Section 209(a) foreclose this effort to circumvent the absolute statutory bar against the private supplementation of federal salaries.

a. Section 209(a) provides:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government * * * from any source other than the Government of the United States * * *; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

This statutory language is written in all-embracing terms. The first paragraph broadly applies to "[w]hoever" receives such payments; it is not limited to persons who happen to be federal officials at the time the payments are made. Accordingly, payments received by an individual before or after his federal service are within the statutory ban. Moreover, the first paragraph applies to the receipt of "any" supplementation of salary from "any" source other than the United States. The term "any" underscores the comprehensive thrust of the prohibition (*United States* v. *Monsanto*, 109 S. Ct. 2657, 2663 (1989)), for "Congress could not have chosen broader words to define [its] scope" (*id.* at 2662). See also *Betts*, 109 S. Ct. at 2864. The language of the first paragraph of Section 209(a) therefore clearly covers lump-sum payments (including those characterized as "severance payments"), as long as they are "compensation for" the employee's federal service. See pages 34-45, *infra*.

The individual petitioners argue, however, that the second paragraph of Section 209(a) does not bar payment of a salary supplementation prior to the time the recipient assumes his federal position. Petitioners rest this argument on the premise that the second paragraph is limited to payments made "to . . . any such officer or employee." See Br. 19, 20, 23. This assertion is refuted by the operative language of the second paragraph taken as a whole, which petitioners "regrettably submerge[] in ellipsis" (*Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 476 (1988) (Scalia, J., concurring)). The second paragraph of Section 209(a) imposes liability on any person who "pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee." The use of the disjunctive "or" in two places, and the location of the commas, demonstrates that the quoted language states three separate prohibitions. The third prohibition, which applies here, imposes liability on a person who "in any way supplements the salary of" "any such officer or employee." This language is not limited to supplementations paid "to" the recipient at the time he is an officer or employee; all the statutory text requires is that the payment "supplement[] the salary of" a federal officer or employee—a consequence that can result from a payment made prior to the formal onset of federal service as well as after. It also is significant that the relevant language broadly refers to all payments that "in any way" supplement the salary of a federal employee, thereby manifesting a congressional purpose to preclude the sort of circumvention that would be encouraged by petitioners' proposed loophole for all pre-appointment payments.

b. The background and legislative history of the 1962 Act confirm this straightforward reading of the statute in several ways. First, as we have explained (see pages 21, 22, *supra*), Congress revised the first paragraph of the prohibition to make clear that it (like the second paragraph) would apply to "lump sum" payments that supplement the recipient's federal salary (*Staff Report* 61)—the most obvious of which would be lump-sum severance payments made in consideration of the recipient's federal service. Second, one of Congress's purposes in thus revising the first paragraph was to "conform" the prohibitions

applicable to the payor and payee. House Report 24; *Staff Report* 45, 61. This purpose strongly suggests that the second paragraph bars the making of all payments the receipt of which is barred by the first paragraph; since the first paragraph clearly applies to payments made prior to formai commencement of federal service, the second paragraph therefore does as well.

Third, and of particular significance here, the first paragraph of the prohibition against outside compensation, as set forth in 18 U.S.C. 1914 (1958), provided: "Whoever, *being a Government official or employee*, receives any salary in connection with his services as such an official or employee" (emphasis added). The individual petitioners argue (Br. 20-21) that the emphasized language limited the application of Section 1914 to payments made to incumbent federal officials. Even if that proposition is correct, however, petitioners' effort to use it to exempt the "severance" payments at issue here from the coverage of Section 209(a) is doomed by the fact that Congress *deleted* that phrase when it revised the prohibition in 1962.

Petitioners argue (Br. 20-22) that the Court should not give effect to Congress's deletion of the phrase on which they rely because the legislative history does not expressly refer to payments made prior to the commencement of federal service and does not state that the coverage of the prohibition was changed in this respect. As this Court recently held, however, there is no requirement that Congress recite in legislative history its intention to depart from what may have been the previous rule in order for the courts to give effect to its new enactment. *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026 (1989); see also *Monsanto*, 109 S. Ct. at 2662-2663; *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983).

Indeed, the premise of petitioners' argument—that former Section 1914 would not have barred the payments here—is of dubious validity. Roswell Perkins observed that prior to enactment of Section 209(a), "[t]he Justice Department's attitude toward severance payments ha[d] been stern." 76 Harv. L. Rev. at 1138-1139. He relied on a Justice Department memorandum stating with respect to Section 1914 that " 'a special severance

payment of more than nominal amount made to an employee *in anticipation of his working for the Government, and whether paid at once or spread*, would in all likelihood be objectionable.' "[22] Several commentators cited in the legislative history of the 1962 Act also understood Section 1914 to bar severance payments made in consideration of the recipient's anticipated services to the federal government.[23] See also *1962 Hearing* 40 (statement of Rep. Lindsay).

Moreover, the report on the bill proposed by the New York City Bar Association recognized that "occasionally an outside source may try to make a payment to a government employee before he becomes an employee or after he terminates his government employment, with the intention and purpose of compensating the employee for the work done while in Washington." *N.Y. Bar Report* 213. The report then stated that although Section 1914 was ambiguous on this point (*id.* at 64-65, 212-213), the Association's bill explicitly barred such payments "[w]henever received" (*id.* at 213). See *id.* at 286-287 (§ 5(b) of Association's proposed bill); *1961 Hearings* 47 (Justice Department comments on § 5(b)).

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[22] See DOJ Mem., *Conflicts of Interest Questions Arising From Stock Options, Pension Rights and Other Executive Benefits of Individuals Entering Government Employment From Private Business*, at 5 (emphasis added), *quoted in* Perkins, 76 Harv. L. Rev. at 1139 n.89; see also *id.* at 1141 n.93 (" 'an *ad hominem* grant of [a stock] option upon the employee's leaving his company to enter the Government might contravene the statute' ").

[23] See McElwain & Vorenberg, 65 Harv. L. Rev. at 967 ("It is perfectly plain that Section 1914 outlaws double compensation for Government service, but it is sometimes difficult to determine when a particular payment is 'in connection with his services' as a Government employee. For example, it is sometimes hard to tell whether a bonus paid just before an entry into Government service constitutes in fact a payment for past services rendered the employer or whether it is a prospective sweetening of the employee's Government salary."); Davis, 54 Colum. L. Rev. at 905 (footnote omitted) ("[T]he retirement bonus given to a departing company official is permissible when it is said to be paid in gratitude for past services rendered or as an inducement to return after the termination of the Government job, but the same bonus is not acceptable when its purpose is to enable the company official to carry on financially in a low-paying Government position.").

Against this background, whatever uncertainty there may have been regarding the validity of pre-employment payments under the former Section 1914, Congress's omission of the phrase "being a Government official or employee" from the first paragraph of Section 209(a) removed any limitation on its reach in this regard.[24] This conclusion is reinforced by Congress's deletion of a similar phrase ("being • • • [an] officer or employee of the United States") from the related prohibition in 18 U.S.C. 281 (1958) when it revised and reenacted that provision as 18 U.S.C. 203 in 1962. Section 281, like the present Section 203, barred a person from receiving compensation for services rendered on behalf of a private party before a government agency while the recipient was a government employee. The House Report explained the deletion of the phrase just quoted by observing that although "Section 281 fails to prohibit preemployment receipt or agreement to receive, or postemployment receipt of, compensation with respect to services to be rendered or actually rendered during the period of Government employment," the new Section 203 "would correct this omission." House Report 20; see also *Staff Report* 8, 22, 25, 49, 51.

The legislative history thus shows that Congress was aware, and specifically intended, that deletion of the phrase "being • • • [an] officer or employee of the United States" from the prohibition in 18 U.S.C. 281 (1958) would have the effect of prohibiting receipt of "all compensation" for services rendered on behalf of *private parties* while in office, "irrespective of the time of its payment." House Report 9. Congress therefore must also have been aware that its deletion of the parallel phrase "being a Government official or employee" in 18 U.S.C. 1914

[24] Petitioners contend that the Kennedy Administration could not have intended to criminalize pre-employment severance payments because the Secretary of Defense in that Administration, Robert S. McNamara, received payments totalling $618,750 from his former employer. See Br. 22 n.14, citing *McNamara To Get $618,750 As Bonus*, N.Y. Times, Jan. 22, 1961, at 49, col. 6. However, as the newspaper article explains, those payments were made pursuant to an established company policy and were compensation for his past services. See also *Nomination of Robert S. McNamara: Hearing Before the Senate Comm. on Armed Services*, 87th Cong., 1st Sess. 33-35 (1961).

(1958) would remove any doubt that the new Section 209(a) prohibits the receipt of all compensation for services to be rendered on behalf of the *United States* while in office, irrespective of the time of payment. Sections 281 and 1914 were viewed as interrelated, and they overlapped in coverage where the services for which the private party paid compensation could be said to have been performed for both the government and the private party. *Staff Report* 24, 61. See, *e.g.*, 40 Op. A.G. 168 (1942); 31 Op. A.G. 470 (1919); 2 Comp. Gen. 775 (1923); see also 41 Op. A.G. 217, 220 (1955); 40 Op. A.G. 187, 190 (1942).[25]

It also is significant that the prohibition against receipt of outside compensation for government services has consistently been regarded as closely related to the prohibition against bribery (House Report 6, quoting *Muschany*, 324 U.S. at 68) and "buttresses the bribery sections • • • by eliminating donations to salary, even where it is impossible to prove intent that official action should be influenced by the payment." *Staff Report* 45; see also *id.* at 61; *N.Y. Bar Report* 211. As petitioners concede (Individ. Br. 23), the bribery statute, 18 U.S.C. 201, expressly applies to payments made prior to the formal commencement of federal service, because it covers payments made (with intent to influence official action) to a "person who has been selected to be a public official."[26]

[25] Petitioners also rely (Individ. Br. 20) on a passage in the Senate Report stating (at 14) that Section 209 forbids payments "to a Government employee," without expressly referring to a person who has not yet formally commenced his federal service. The Senate Report described the statutory ban in general terms; it did not purport to explain all the details of its application. The Senate Report similarly explained (at 9) the new 18 U.S.C. 203 in general terms as prohibiting "officers or employees of the Government from receiving compensation for services rendered for others," without expressly referring to payments received before the formal commencement of federal service; yet it is clear that Section 203 reaches such payments.

[26] Petitioners point out (Individ. Br. 23) that the bribery section specifically mentions payments made to persons who have not yet assumed office while Section 209 does not. However, Section 209 broadly applies to "[w]hoever" receives "any" supplementation of salary for his government services; this all-encompassing language clearly includes recipients who have not yet formally assumed office. Compare *Monsanto*, 109 S. Ct. at 2663. The fact that Section

c. Accordingly, the text and legislative history of Section 209(a) establish that "[t]he time of receipt of the outside compensation is clearly irrelevant under the [1962] act, if the compensation is for government services." Perkins, 76 Harv. L. Rev. at 1137. Petitioners suggest (Individ. Br. 18) that the Department of Justice only recently came to that view, because this is the first time it has brought a civil or criminal case against anyone for receiving a severance payment. However, for more than 15 years, the Office of Legal Counsel has consistently taken the position in its advice to other agencies and prospective appointees that Section 209(a) bars "severance" payments made in consideration of the recipient's entering federal service, rather than for past services to the payor, and calculated to compensate the recipient for his lower federal salary and benefits and other expenses incident to his acceptance of the appointment. See App., *infra*, 3a-50a.[27] The Office of Government Ethics,

209 does not specifically identify that (or any other) subcategory of recipients " 'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.' " *Ibid.*, quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985). The difference in the wording of Sections 201 and 209 is attributable to the fact that the bribery provisions were the subject of a somewhat distinct study and revision (see *Staff Report* (Pt. II)), and Congress therefore did not use the same terminology in revising Section 201 as it used in revising the conflict-of-interest laws. Accordingly, the appropriate place to look for parallels to the precise text of Section 209 is the related conflict-of-interest provision in 18 U.S.C. 203, which unquestionably covers pre-employment payments even though its text does not specifically refer to them.

Petitioners also argue (Individ. Br. 23-24) that they were beyond the reach of the bribery statute at the time they accepted the severance payments because they had not been officially informed that they would be nominated or appointed (see 18 U.S.C. 201(a), para. 2), and that it therefore would be anomalous to apply Section 209 to them. This argument is without merit. Each of the individual petitioners had already either started federal employment as a consultant or been sufficiently assured of his nomination or appointment at the time the payments were made. See note 2, *supra*. In any event, the fact that the reach of Sections 209 and 201 might not precisely coincide at the margins (due to their different drafting histories) does not warrant a construction of Section 209 that altogether excludes payments made prior to the formal commencement of federal service.

[27] Because most of the relevant OLC opinions are unpublished, they were appended to the government's brief in the court of appeals and are appended

which has statutory authority to render advisory opinions on ethics matters (5 U.S.C. App. 402(b)(8)), has also made clear that a severance payment is lawful only if the recipient is being compensated for past services to the company, not future services for the government, and if persons entering federal service are not singled out for special treatment. See Ops. O.G.E. 81 × 16 (1981), 85 × 11 (1985) (App., *infra*, 51a-55a).[28]

to this brief as well. The OLC opinions are cited principally to rebut petitioners' suggestion that the government adopted its position recently and to ensure that the Court has all relevant materials (and may give them whatever weight they warrant), rather than in an attempt to bind petitioners to the holdings in the opinions. The individual petitioners contended in their reply brief at the petition stage (at 5) that under 5 U.S.C. 552(a)(2), no reliance can be placed on these OLC opinions because they were not indexed and made available to the public for inspection and copying. However, OLC opinions are exempt from that requirement by virtue of 5 U.S.C. 552(b)(5). Courts frequently refer to such agency counsel opinions where relevant to the issues before them. See, *e.g.*, *Greentree* v. *U.S. Customs Service*, 674 F.2d 74, 84-85 (D.C. Cir. 1982); *Symons* v. *Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 243 n.7 (D.C. Cir. 1981); *NTEU* v. *Reagan*, 663 F.2d 239, 251 n.19 (D.C. Cir. 1981).

Petitioners rely (Individ. Br. 24-25) on the statement in the Attorney General's 1963 interpretative memorandum that Section 209 "uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance." *Memorandum Regarding Conflict of Interest Provisions of P.L. 87-849* (Feb. 1, 1963), 18 U.S.C. 201 note. That general statement appears to address the nature of the payments that are barred (see page 37, *infra*), not the distinct issue presented here. Moreover, because Section 1914 apparently was understood by this Department to apply to pre-employment payments, the language quoted from the Attorney General's 1963 memorandum is consistent with a similar reading of Section 209(a). The longstanding position of OLC also demonstrates that this general language in the Attorney General's 1963 memorandum was not understood to exempt such payments.

[28] Petitioners refer to annual payments to be made to Deputy Secretary of Labor Roderick DeArment by his former law firm and a $200,000 severance payment made to Deputy Secretary of State Lawrence Eagleburger. See Individ. Br. 22-23 n.16, citing *U.S. Allows Long-Term Severance Pact*, Wash. Post, May 20, 1989, at A11, col. 4, and *Scowcroft's '88 Income Was $500,000*, Wash. Post, Mar. 14, 1989, at A7, col. 1. The public account of the former arrangement makes clear that the payments are made pursuant to an existing plan, based on past services to the firm. We have been informed by the Office of Government Ethics that it approved the payment to Deputy Secretary Eagleburger because it was satisfied that the payment was made as compensa-

d. Nor are petitioners correct in contending that the purpose of Section 209(a)—to assure the independence and undivided loyalty of federal officials—does not support its application to lump-sum "severance" payments made prior to formal commencement of federal service. As in the case of a bribe, Congress obviously concluded that an advance payment can be presumed to have a lingering effect on the recipient when he performs his official duties. Furthermore, the compelling interest in preserving public confidence in the integrity of government officials would be undermined if the parties could so easily circumvent the statutory prohibition against private supplementations of salary.[29]

Petitioners also argue (Individ. Br. 25-28) that Section 209(a) should be construed not to apply here in order to facilitate government recruitment of qualified personnel. Congress, however, carefully weighed the competing needs for qualified personnel and to assure integrity, and it struck what it believed to be the appropriate balance. It chose not to carve out a blanket exception for all "severance" payments, including those made as compensation for the recipient's federal service. The absence of such an exception is especially significant in view of other express exceptions Congress included in Section 209.[30]

tion for his past services to Kissinger Associates, not in consideration of his accepting a government position.

[29] Petitioners err in citing *United States* v. *Muntain*, 610 F.2d 964 (D.C. Cir. 1979), and *United States* v. *Raborn*, 575 F.2d 688 (9th Cir. 1978), for the proposition that "Congress intended Section 209 to be limited to incumbent federal officials" (Individ. Br. 25 n.18). *Muntain* merely held Section 209 inapplicable because the payments were made for an outside job that the defendant performed while on annual leave and that had no connection to his official duties. *Raborn* involved defendants who concededly were government employees, and the Ninth Circuit, in that context, observed that the statute "prohibits * * * an officer or employee of the executive branch" from receiving any supplementation of salary. 575 F.2d at 691-692.

[30] The statute contains exceptions for special Government employees, who serve less than 130 days annually, 18 U.S.C. 202 (18 U.S.C. 209(c)); employees serving without compensation (18 U.S.C. 209(c)); payments made by state and local governments (18 U.S.C. 209(a)); certain travel and moving expenses (18 U.S.C. 209(d) and (e)); and certain payments to employees injured while protecting the President (18 U.S.C. 209(f)).

Most importantly, at the urging of the New York City Bar Association (*N.Y. Bar Report* 217-218), Congress sought to mitigate financial hardship by allowing persons entering the government to continue to participate in "bona fide" employee welfare or benefit plans maintained by their former employers. 18 U.S.C. 209(b). But Congress made no further exception permitting supplementations of federal salaries by lump-sum "severance" payments from former employers that are not based on benefit plans of general applicability. Moreover, recognizing that a particular need for highly qualified personnel for defense purposes might warrant exemption from the prohibition against outside compensation, Congress enacted special authority for the President to grant exemptions in certain circumstances. See 50 U.S.C. App. 2160(b)(4).[31] This narrow provision further contradicts petitioners' efforts to fashion a broad exemption for defense (and other) personnel who do not qualify under it.

Nor are the individual petitioners persuasive in relying (Br. 28-32) on common-law principles of agency. The short answer is that Congress did not incorporate common-law principles in Section 209. In any event, Section 209 does not impose an all-inclusive duty of undivided loyalty on a person who has not yet begun federal employment. He is free, for example, to work for a private employer whose interests directly conflict with those of the United States. Section 209 imposes a duty on him only with respect to his prospective federal employment, by barring the receipt of private compensation for that employment. This limited prohibition is directly related to (and serves to maintain the integrity of) the prospective federal employment (cf. *United States* v. *Hood*, 343 U.S. 148, 150-151 (1952)), and it affects only payments that would not have been made but for that employment. Even the common law imposes some fiduciary duties on a person who has not yet become an agent. For example, "[a] per-

[31] For other special exemptions from 18 U.S.C. 209, see 5 U.S.C. 3343(c) (expenses of employees detailed to international organizations); 45 U.S.C. 362(h) (employers and employees assisting the Railroad Retirement Board); 7 U.S.C. 2220 (employees engaged in agricultural or Forest Service cooperative extension programs); 8 U.S.C. 1353c (reimbursement for services of immigration officers inspecting aliens in foreign countries).

son who, in view of a prospective agency, invites a confidence from or permits the prospective principal to reveal confidential information to him, is subject to the same duties with respect to such information as if, at the time the confidence was given, he were in fact an agent." Restatement (Second) of the Law of Agency § 395, comment d (1958). The comparably limited duty of loyalty to the prospective employer under Section 209 scarcely "stretch[es] beyond recognition the fundamental principles of agency law," as petitioners argue (Individ. Br. 28).

3. *The Payments Constituted "Compensation For" The Recipients' Federal Service Within The Meaning of Section 209(a)*

Petitioners' contention (Individ. Br. 43-49; Boeing Br. 17-26) that the payments were not made as "compensation for" the recipients' federal services is premised on an erroneous legal view of Section 209(a) and ignores the overwhelming evidence that the statute was violated.

a. Section 209(a) refers to supplementations of salary made "as compensation for" the recipient's services to the United States in order to identify the payments to be barred. Absent some such limitation, any cash payment or other transfer of economic value to a federal employee might fall within the reach of the statute, because it would "supplement" the recipient's federal salary in the sense of being available for him to spend during the period of his federal service. Such a rule could forbid a federal employee from receiving gifts from family members or friends, income from investments, or salary earned in an outside job. That result would not only be unfair to federal employees and inhibit recruitment (see Manning, at 164), it would also extend far beyond the statutory purpose of assuring the independence and undivided loyalty of federal employees in performing their duties. Accordingly, Section 209(a) prevents only those private supplementations of salary that are "directly linked" to the recipient's federal employment (Manning, at 171). As we shall now show, the history of Section 209 establishes that the role of the "as compensation for" language is to interpose that limiting principle. Contrary to the apparent view of petitioners and the district court (Pet. App. 20a), that phrase does

not have the further effect of rendering Section 209 one of those rare criminal statutes requiring proof of specific intent.

b. The former Section 1914 used different language of limitation, but its purpose was the same. Section 1914 made it unlawful for a government official to receive any salary "in connection with" his services to the government. The Attorney General interpreted this language in a 1942 opinion (40 Op. A.G. at 190):

> The statute clearly covers a salary received from a private person or source if it is paid or received as compensation or part compensation for the services rendered to the Government. It has also been held to apply if the officer or employee renders the same or similar services to both the Government and a private person (33 Op. A.G. 273 [1922]). It does not, however, prohibit payment for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government.

See also 42 Op. A.G. 111, 126 (1962); Manning, at 166-168.

The "in connection with" language was, however, imprecise and capable of unduly broad interpretation. *N.Y. Bar Report* 212-213. For example, it seemed to encompass payments for services performed outside the scope of the recipient's government employment but related to its subject matter, such as compensation received by a government tax auditor who, on his own time, helped a third party with his taxes. See *United States* v. *Gerdel*, 103 F. Supp. 635, 638-639 (E.D. Mo. 1952). As the New York City Bar Association pointed out: "Clearly an outside source may not, consistently with Section 1914, pay the government official 'to' take the government job or 'for' his government work. But may a former employer make *any* payment to the employee that will not raise the inference that it was made 'in connection with' his governmental duties?" *N.Y. Bar Report* 65 (emphasis in original). At the same time, the prohibition was "peculiarly susceptible of evasion," because the basis for a payment might not be objectively ascertainable (*Staff Report* 44) and because almost any payment could be characterized as

being "in connection with" past services rather than government employment (*N.Y. Bar Report* 65-66).

After canvassing the Attorney General opinions construing Section 1914, the House Judiciary Committee's *Staff Report* concluded in 1958 that "[s]alary payments avowedly designed to supplement Government salary or as donations to the Government have been held unlawful." *Id.* at 44, citing 31 Op. A.G. 470 (1919); 33 Op. A.G. 273 (1922); 40 Op. A.G. 265 (1943).[32] By contrast, "payments in connection with leave with pay from the faculty of a privately endowed engineering school were held to have been made, not in consideration of the performance of Government services in the period of leave, but in consideration of past service to the private employer." *Staff Report* 44, citing 39 Op. A.G. 501 (1940).

In an "effort to provide for a clearer and more predictable standard linking the payments and the employee's job" (*N.Y. Bar Report* 212), the New York City Bar Association recommended two changes in the prohibition then contained in Section 1914. First, it recommended an exception, ultimately enacted in 18 U.S.C. 209(b), permitting a federal official to continue to participate in an employee welfare or benefit plan maintained by a former employer, provided that the plan is "bona fide." This exception categorically resolved uncertainties under prior law in applying the "in connection with" standard to benefits received under such plans. Moreover, the requirement under Section 209(b) that the payments be made pursuant to a pre-existing plan in which the departing employee is already participating served to minimize the possibility that persons entering federal employment might be singled out for favorable treatment. *N.Y. Bar Report* 65, 217-218; Perkins, 76 Harv. L. Rev. at 1139-1140; Manning, at 171; *1960 Hearings* 821; *1961 Hearings* 62; *1962 Hearing* 22, 46-47.

Second, the Bar Association recommended that the "in connection with" language in Section 1914 be replaced with

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[32] Accord, *International Ry. v. Davidson*, 257 U.S. 506, 515 (1922); 2 Comp. Gen. 775 (1923); 18 Comp. Gen. 460 (1938); 26 Comp. Gen. 15, 17-18 (1946); 29 Comp. Gen. 163, 167 (1949); 36 Comp. Gen. 135 (1956).

language barring payments "for or in consideration of" federal government service. *N.Y. Bar Report* 286. The Justice Department recommended the same change, in order "to emphasize the intent that the prohibition is against private payment made expressly for services rendered to the Government." *1961 Hearings* 42. Congress accepted these recommendations, but used different language to achieve the same result. Section 209(a), as reported by the House Judiciary Committee and finally enacted, bars supplementations of salary "as compensation for" the recipient's services to the government; but, echoing the Justice Department's explanation of the phrase "in consideration of," the House Report stated (at 24-25) that the change emphasized that "the prohibition is against private payment made expressly for services rendered to the Government."

At bottom, Congress's substitution of the phrase "as compensation for" did not change the scope of the prohibition in the former Section 1914; instead, as the Senate Report explained (at 14), it "reenact[ed] [that] prohibition in substance," albeit using language that "is more precise in expressing what is clearly intended by the present broad phrase." That also was the considered judgment of the Attorney General, who opined immediately after Section 209 was enacted that it "does not vary from [Section 1914] in substance." *1963 Memorandum*, 18 U.S.C. 201 note; accord, Perkins, 76 Harv. L. Rev. at 1138 & n.87. Section 209 therefore should be understood to have codified the Attorney General's interpretations of former Section 1914, under which payments that are "avowedly designed to supplement Government salary" are barred. *Staff Report* 44. And by making clear that the requisite "connection" between the payment and the public employment is that the former is made "as compensation for" the latter, the revised language establishes that the prohibition includes all arrangements where the anticipated public employment is the consideration for the payment in the classic contract sense. Similarly, the fact that the legislative history equates "as compensation for" with "in consideration of" indicates that Section 209 is also implicated where public employment is the "but for" cause of the payment.

c. Several important principles informing the interpretation of Section 209 emerge from the derivation of the phrase "as compensation for"—principles establishing that the payments here violated the statute. Of course, the usual severance payment—made solely on the basis of past services rendered to the employer, without reference to the anticipated future status or activities of the departing employee—is lawful under Section 209. Perkins, 76 Harv. L. Rev. at 1138-1139. But here, the payments were "directly linked" to the anticipated federal employment of the recipients (Manning, at 171), not their past services to Boeing. Section 209(a) does not permit such an arrangement.

i. Although the payments here were labeled "severance payments," they had little to do with the recipients' services to Boeing. Instead, as the calculations made by both Boeing and the recipients show, the payments were "avowedly designed to supplement Government salary" (*Staff Report* 44). Such a payment is by its nature "compensation for" the recipient's service to the federal government, and the requisite connection between the payment and those services is established as a matter of law. Indeed, a major element of petitioners' calculations was the difference between the individual's federal salary and benefits and the higher salary and benefits he would have been paid by Boeing. Such differentials are unquestionably "supplementations of salary" within the meaning of Section 209(a). It also is firmly established that moving expenses and cost-of-living allowances paid solely because of the recipient's federal service are prohibited "supplementations of salary" for purposes of Section 209(a). See pages 20-23, *supra*. Because the payments at issue here were avowedly designed for these purposes, they were, by definition, "compensation for" the recipient's services as a federal official.[33]

[33] The word "compensation" connotes not only payment for services rendered, but also "recompense" and "something that makes up for a loss" (*Webster's Third New International Dictionary* 463 (1986)). By making up for the recipient's financial losses resulting from his performance of services for the federal government, payment of moving expenses and cost-of-living allowances serves as "compensation" for federal services in this sense as well.

ii. Boeing did not have an established policy of general applicability that rewarded past services to the Company by providing severance payments to all employees leaving to take any of a broad range of jobs. The uncontradicted evidence, accepted by both courts below (Pet. App. 8a, 17a-18a), showed that over a 20-year period, Boeing consistently made such payments *only* to persons who were to assume positions of responsibility with the federal government. Singling out persons entering federal service for special treatment—and making payments to them only because of their federal service—is a sufficient basis for finding the payments to be unlawful. 2 Op. O.L.C. 267, 268 (1978); 5 Op. O.L.C. 150, 151 (1981); Op. O.G.E. 81 × 16 (1981) (App., *infra*, 51a-52a); 45 Comp. Gen. 308, 312 (1965).[34] Indeed, Boeing did not have a uniform policy of making "severance" payments even to all persons who left to work for the federal government. Instead, Boeing decided on a case-by-case basis whether the particular position warranted a payment and what its amount should be. J.A. 280-283.

The statutory relevance of the payor's singling out federal employees and retaining discretion is shown by the exception in Section 209(b) permitting continued participation in a bona fide pension, retirement or other benefit plan. That exception's requirement that the plan be one of general applicability in which the departing employee is already enrolled serves to guard against favored treatment for federal employees as a class and against discretionary payments that have an inherent propensity to be made and accepted as special rewards to individual federal officials. See page 36, *supra*.

iii. Also significant is whether the payor has an interest in the recipient's governmental duties or a sensitive relationship

[34] See Perkins, 76 Harv. L. Rev. at 1139:

> The sole test should be, we submit, the factual one of whether the payment is made in consideration of past services. To test its own intent, the board of directors of the corporation from which the executive is departing should ask itself: would we make the same severance payment if the corporate executive were leaving, with no idea of returning, to accept the presidency of a college or of a charitable foundation, or to enter the ministry?

with his employing agency. See 41 Op. A.G. 217, 221 (1955); 31 Op. A.G. 470 (1919); 45 Comp. Gen. 308, 312 (1965); *Staff Report* 44-45; Manning, at 164-165; McElwain & Vorenberg, 65 Harv. L. Rev. at 967; Davis, 54 Colum. L. Rev. at 904-905; Dembling & Forrest, 20 Geo. Wash. L. Rev. at 191-192. Although Section 209(a) applies to all payors who make a prohibited payment, even those who are unaffected by the agency's work, the existence of a sensitive relationship between the payor and the agency creates a distinct likelihood that the recipient's federal services are (or would be perceived to be) consideration for the payment, and it triggers the concern about divided loyalty (or the appearance thereof) that gave rise to enactment of the prophylactic prohibition against outside compensation.

This factor has particular relevance here. Boeing is a large defense contractor, and it therefore has a significant interest in the affairs of the Defense Department generally. Furthermore, although the individual petitioners did not have procurement or contracting responsibilities in the Defense Department, they were involved in crucial areas of research and development and long-range defense planning that were of obvious interest to Boeing because of their impact on future weapons policies and systems. The record demonstrates that those considerations in fact played a role in Boeing's decision to subsidize the government positions at issue here. The President of Boeing Aerospace stated in recommending the payment to Crandon that Crandon would "be an asset to Boeing in the NATO arena" (J.A. 284). A Boeing document supporting the payment to Kitson stated that his "job with the DOD is viewed as bigger than Crandon's—& has greater influence relative to [Boeing Aerospace]" (J.A. Lodging No. 18). The President of Boeing Aerospace recommended Reynold's payment because he would "hold a *key* job" (J.A. Lodging No. 17). And he recommended Jones' payment because, inter alia, "having someone with his views will be helpful to us *while* he is in Washington" (J.A. 277).

iv. Finally, the district court found that the payments were made to encourage Boeing employees to accept government positions (Pet. App. 17a); the court of appeals agreed, noting that "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*id.* at 8a); and petitioners concede in this Court that the purpose of the payments was "to encourage public service by decreasing the financial penalties incurred by employees who left the employ of Boeing to enter public service" (Boeing Pet. 5; see also Boeing Br. 24; Individ. Br. 25-26). Because Boeing effectively paid the individual petitioners to accept their positions in the Department of Defense, those payments were, under Section 209(a), "compensation for" the services that they would perform in those positions: "Clearly an outside source may not, consistently with Section 1914, pay the government official 'to' take the government job" (*N.Y. Bar Report* 65).

In sum, on the basis of the undisputed evidence and the district court's factual findings, all of the factors that render a payment a prohibited "supplementation of salary" as "compensation for" the recipient's government services within the meaning of Section 209(a) are present in this case. Contrary to the individual petitioners' contention (Br. 18), this is not a novel application of the statute. This result and supporting analysis are fully consistent with principles that the Department of Justice has applied for many years in considering the legality of severance payments (see App., *infra*, 3a-50a) and that have been widely recognized in the literature.

d. Petitioners nevertheless seek to avoid liability by arguing that they did not "intend" to make and receive the payments as supplementations of federal salaries or as compensation for the recipients' government services. In petitioners' view, the phrase "as compensation for" in Section 209(a) requires a showing of "specific intent"—a showing that the payment were made and received for the *purpose* of compensating the recipients for their federal service. We disagree. As we have explained, the phrase "as compensation for" is designed to identify the nexus that must exist between the payment and the federal services, not to state an elevated standard of *mens rea*. The quoted phrase does not use language of intent, and Section 209(a) as a whole is silent on that question. We do not suggest that Section 209(a) thereby prescribes no element of intent. Cf. *Liparota* v. *United*

States, 471 U.S. 419, 425 (1985). But, in light of the silence in the statutory text, Section 209(a) should not be interpreted as one of those rare criminal statutes that requires a showing that the defendant acted with the purpose—the "conscious object"—of producing the particular effect that the statute proscribes. *United States* v. *Bailey*, 444 U.S. 394, 404 (1980). In accordance with ordinary rules of construction, it is sufficient to prove that the defendant acted with knowledge of the probable consequences of his actions. Compare *Bailey*, 444 U.S. at 402-409; *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-446 (1978). Such a rule comports with the purpose of Section 209 of preventing not only actual corruption, for which a showing of specific intent might be required (see 18 U.S.C. 201), but also real or apparent conflicts of interest that undermine public faith in the integrity of government. See *Mississippi Valley*, 364 U.S. at 560-561. Accordingly, criminal liability is established under Section 209 upon proof that the defendant knowingly made or received payments having the characteristics that render them "supplementations of salary" and "compensation for" services performed as a federal official within the meaning of Section 209(a). See *Muntain*, 610 F.2d at 969. *A fortiori*, a showing of specific intent is not required in a civil case, in which a party ordinarily is presumed to have intended the natural consequences of his acts. *Clarion Bank* v. *Jones*, 88 U.S. (21 Wall.) 325, 337 (1875).

As we have explained, under the undisputed evidence and findings in this case, the payments at issue here were, as a matter of law, "supplementations of salary" made "as compensation for" federal services within the meaning of Section 209(a), because they were specifically designed to augment the recipients' income and mitigate financial sacrifices associated with federal employment; the recipients' anticipated federal employment was the reason for the payments; the payments were regarded as inducements to accept the federal positions; and Boeing had an interest in those positions. Regardless of whether each was aware of all the details of the payments' calculation, there is little doubt that the recipients and responsible Boeing officials were aware of the essential nature of the payments that rendered

them unlawful under Section 209.[35] That is all that is required to establish liability.

Hence, petitioners err in relying (Individ. Br. 46; Boeing Br. 17-18) on the district court's conclusory findings regarding intent (Pet. App. 20a). The essential nature of the payments as supplementations of federal salary and compensation for federal services under Section 209(a) was established as a matter of law, and petitioners were aware of the nature of the payments. It is irrelevant whether petitioner Boeing "intended" and the individual petitioners "understood" the payments to be a "supplementation" or "compensation" in whatever different sense either petitioners or the district court might have used those terms. In short, the factual "finding" on which petitioners rely rested on significant legal errors regarding the interpretation of Section 209(a) and the elements of a cause of action under it.[36] Appellate review of a factual finding for possible error in the legal premises on which it rests is not governed by the "clearly erroneous" test in Fed. R. Civ. P. 52(a). *Icicle Sea-*

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[35] The individual petitioners cite (Br. 48) testimony that they did not know how the responsible Boeing officials computed the final amount of their payments. They do not dispute, however, that they submitted worksheets computing the financial loss that would result from entering government service. Because, from the individual petitioners' perspective, the payments clearly constituted a mechanism for making up some or all of that loss, the payments were received as "supplementation of salary" and "as compensation for" their federal services. Similarly, although Boeing cites (Br. 24) the district court's finding that its chief executive officer (Mr. Wilson), who gave final approval to the payments, did not know the "specific calculation method" (Pet. App. 20a), Boeing surely cannot avoid liability on that basis. Mr. Wilson knew that the payments were to be made only because of the recipients' anticipated federal service, and he approved the recommendation of responsible Boeing officials who concededly utilized a method of calculation that, in itself, rendered the payments unlawful under Section 209. In any event, Mr. Wilson was aware that the calculations were based in part on the salary differential and moving expenses, which sufficiently informed him that the payments had characteristics that rendered them unlawful. See pages 5-7, *supra*.

[36] For example, the district court was of the view that all "severance" payments are per se lawful under the statute and that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (Pet. App. 26a).

foods, Inc. v. *Worthington*, 475 U.S. 709, 714 (1986).[37] For similar reasons, petitioners err in relying (Individ. Br. 47-48; Boeing Br. 22-23) on the testimony by the recipients and Boeing officials that might have been the basis for the district court's finding with respect to their intentions and understandings.

In any event, the court of appeals found the record overwhelmingly inconsistent with the witnesses' self-serving testimony and the district court's conclusory findings on these points.[38] This is not a case where a witness "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985). Rather, as this Court has stated (*ibid.*):

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

In this case, the court of appeals was properly " 'left with the definite and firm conviction that a mistake ha[d] been committed.' " *Id.* at 573 (citation omitted).

[37] Petitioners also assert that the district court "found" that the payments were made "to sever the relationship with these employees *based on past performance* and accumulated benefits" (Individ. Br. 46, quoting Individ. Pet. App. 25a (emphasis added by petitioners)). The quoted statement, however, appears in the district court's "Conclusions of Law," not its "Findings of Fact." Moreover, although the recipients' past services to Boeing obviously furnished an occasion for making the payments—Boeing presumably would not make such payments to persons having no affiliation with the Company—the triggering event for the payments and the basis of their calculation was the recipients' anticipated federal employment.

In any event, petitioners' ties with Boeing were severed through their receipt of separate checks reflecting the value of accrued benefits to which every other terminating employee would be entitled. By contrast, the overwhelming percentage of each individual's payment request to Boeing consisted of *future* financial losses. The submissions also included the amounts of Boeing contributions to benefit plans that were accrued but unvested at the time of termination, and the value of stock options that were granted in the year before termination. But because these benefits otherwise would have been lost when they left the Company, it was not necessary for the individuals to receive cash payments for them in order to "sever" their ties. The value of those two items also was relatively small in relation to the total payments. See pages 4-5, *supra*.

[38] This Court has held in civil cases that self-serving declarations by a party as to his intent, unsupported by any extrinsic evidence and contradicted by objective facts, may be found to be insufficient as a matter of law to justify a verdict on behalf of that party. See, *e.g.*, *United States* v. *Generes*, 405 U.S. 93, 106-107 (1972); *United States* v. *Union Pac. R.R.*, 226 U.S. 61, 92-93 (1912); *District of Columbia* v. *Murphy*, 314 U.S. 441, 449, 456 (1941).

II. THE UNITED STATES IS ENTITLED TO RECOVER THE AMOUNT OF THE PAYMENTS IN THIS ACTION

The court of appeals correctly held that the United States has a civil cause of action to require the individual petitioners to disgorge the payments they received in violation of 18 U.S.C. 209 or, in the alternative, to recover the amount of the payments from Boeing (to the extent recovery is not time-barred). Pet. App. 5a-6a, 8a-9a, 10a-11a. A conflict-of-interest statute such as Section 209 is "evidence of the precise nature of th[e] fiduciary duty" owed to the United States (*United States* v. *Kenealy*, 646 F.2d 699, 703 (1st Cir.), cert. denied, 454 U.S. 941 (1981)), and breach of the statutory standard "will establish, as a matter of law, [the agent's] breach of fiduciary duty owed the United States." *United States* v. *Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), aff'd, 572 F.2d 31 (2d Cir. 1978). See *Mississippi Valley*, 364 U.S. at 560-561. Where an employee has received payments relating to his official duties in violation of a fiduciary obligation owed to the United States, he must account for the proceeds to the United States. See *Snepp* v. *United States*, 444 U.S. 507, 514 (1980); *United States* v. *Carter*, 217 U.S. 286, 305 (1910); *United States* v. *Kearns*, 595 F.2d 729 (D.C. Cir. 1978); *United States* v. *Drumm*, 329 F.2d 109, 113 (1st Cir. 1964); Restatement of Restitution § 197 comment c (1937).[39] And where a third party, such as Boeing, has inter-

[39] This remedy was ordered in the one other civil action based on Section 209. *United States* v. *Pezzello*, 474 F. Supp. 462, 463 (N.D. Tex. 1979). See also *N.Y. Bar Report* 56 (discussing Comptroller General decisions stating that payments received in violation of former Section 1914 may be collected by deduction from employee's pay); see, *e.g.*, 30 Comp. Gen. 246, 250 (1950).

fered with an individual's fiduciary duty to the United States by making an illegal payment, the United States has a cause of action for damages against that party—especially where, as here, the payor's conduct separately contravenes the standards in a conflict-of-interest statute. *Continental Management, Inc.* v. *United States,* 527 F.2d 613 (Ct. Cl. 1975).

Petitioners do not dispute that the United States has a civil cause of action to recover illegal payments made to its employees.[40] But the individual petitioners argue (Br. 32-43) that "disclosures" of the payments they claim to have made on their financial-disclosure forms (SF-278s) excuse them from any duty to account to the United States for the payments. This waiver argument was correctly rejected by the court of appeals. Pet. App. 9a-10a.[41]

Unlike other conflict-of-interest laws, Section 209 includes no general provision for a waiver. Compare 18 U.S.C. 207(f), 208(b). When the revision of the conflict-of-interest laws was before Congress, the Department of Defense recommended that the proposed Section 209 include a general provision permitting an agency head to grant exemptions by written order, but Con-

[40] Boeing argues (Br. 26-32) that it is not liable because there was no "actual conflict of interest," but only an "appearance" of improper activity. This argument reflects a fundamental misconception: the statute is not addressed solely to appearances. Section 209 is a conflict of interest statute "[i]n the strictest sense" (*N.Y. Bar Report* 55), as was 18 U.S.C. 434 (1958), at issue in *Mississippi Valley*. "The employee does not have to *do* anything improper in his office to violate the statute" (*N.Y. Bar Report* 55-56), and specific corruption likewise is not an element of the payor's offense under 18 U.S.C. 209(a). Because the harm caused by payments made in violation of Section 209(a) is "uncertain in its mathematical calculation," and nominal damages will deter no one, the amount of the payment is the proper measure of damages. *Continental Management*, 527 F.2d at 619; see also *Snepp*, 444 U.S. at 514-515. Finally, contrary to petitioners' contention (Individ. Br. 26-27), the government did not "concede" or "stipulate" that no conflict of interest or breach of fiduciary duty occurred. See Br. in Opp. 18 n.11.

[41] To support their claim of waiver and certain other arguments, petitioners rely on affidavits attached to their motions for summary judgment. See J.A. 44-82. The affidavits are hearsay, Fed. R. Evid. 801(c), could not have been admitted into evidence, Fed. R. Evid. 802, and do not constitute a part of the trial record that forms the basis for the district court's opinion.

gress declined to adopt that proposal. *1960 Hearings,* at insert following p. 583. And although Congress authorized the President to grant waivers to certain highly qualified personnel needed for the defense effort (see 50 U.S.C. App. 2160(b)(4)), petitioners have not been granted a waiver under that provision.

In light of the absence of any statutory authority for exempting petitioners from Section 209, petitioners' contention that their alleged disclosures on their SF-278s exempt them from liability is flatly inconsistent with *Mississippi Valley*. There the Court held that a government official's alleged knowledge of his subordinate's conflict of interest did not excuse the subordinate from the disqualification requirements of 18 U.S.C. 434 (1958). Noting that neither Section 434 nor any other statute granted the superior official the authority to exempt the subordinate, the Court concluded that it would be contrary to the statutory purposes for the Court to fashion an exempting power that Congress had withheld. 364 U.S. at 561. In the Court's view, Congress "recognized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest," and the prohibition therefore was "designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents." *Ibid.*; see also *id.* at 566; *United States* v. *Medico Indus., Inc.*, 784 F.2d 840, 845 (7th Cir. 1986). As in *Mississippi Valley,* it would be contrary to the purposes of Section 209 for the Court to fashion an exempting authority that Congress withheld. That result would permit petitioners to retain the proceeds of conduct that violated a criminal statute and would unjustly enrich petitioners by excusing them from their duty to account to the United States for payments that they received for their government service and that therefore belong to the United States. Cf. *Caplin & Drysdale* v. *United States,* 109 S. Ct. 2646, 2652-2655 (1989).

There is another legal defect in petitioners' reliance on their SF-278s in claiming an exemption from liability under 18 U.S.C. 209. The regulations governing the financial disclosure program, which were issued by the Director of the Office of Government Ethics pursuant to statutory authority, 5 U.S.C.

App. 402(b)(1), expressly provide that the filing of a financial disclosure report does *not* exempt a government official from applicable statutory prohibitions. 5 C.F.R. 734.104(a)(6).[42] Accordingly, to exempt the individual petitioners from liability based on financial disclosure reports filed under the Ethics in Government Act would be contrary to that Act and implementing regulations, as well as Section 209 itself.

In any event, the factual predicate for petitioners' waiver argument based on the filing of SF-278 forms is wholly lacking, because none of the SF-278s filed by petitioners mentioned a severance payment. Petitioner Crandon did not even file an SF 278 because he did not occupy a position covered by the filing requirement. Reynolds' SF-278 listed no income from Boeing (J.A. Lodging No. 24). Kitson's SF-278 contained two entries for income from Boeing: $159,530 listed as "salary," and $1100 per month listed as "retire. pay" (J.A. Lodging No. 25); his $50,000 "severance" payment was not separately disclosed, although it might have been included in the aggregate amount listed as "salary." Paisley's SF-278 listed the $180,000 he received from Boeing as "compensation for services," not as a severance payment (J.A. Lodging No. 23). Jones' SF-278 listed three items from Boeing: $68,200 in "salary"; $2,501-$5,000 from the Boeing "Financial Security Plan"; and a further $200,300, which was listed under the heading "Other (Specify)," with no accompanying explanation (J.A. Lodging No. 21).

Petitioners seek to overcome this defect by arguing (Individ. Br. 36-38) that regulations governing the completion of disclosure forms did not require them to list the severance payments separately, and that several of the individual petitioners were so informed by Defense Department personnel. That argument misses the point. Petitioners have not been penalized for violating the Ethics in Government Act's disclosure requirements. This suit was brought to require petitioners to dis-

[42] The cited regulation states: "Nothing in the [Ethics in Government] Act or this part requiring reporting of information or the filing of any report shall be deemed to authorize the receipt of income, gifts, or reimbursements, the holding of assets, liabilities, or positions, or involvement in transactions that are prohibited by law, Executive order or regulation."

gorge illegal payments. Petitioners contend they do not have to do so because they disclosed the payments on their SF-278s. The simple fact is that those forms do not identify any severance payments as such. As a result, the government officials who reviewed those forms had no occasion to pass on whether those payments were lawful. For this reason, the certification by the reviewing official on each form that "[t]he information contained in this report discloses no conflict of interest under applicable laws and regulations" does not constitute a considered opinion that the severance payments were lawful, as petitioners urge. See Individ. Br. 36.[43]

Petitioners rest their waiver argument on common-law principles that an agent must account to his principal for "secret" payments received in connection with his employment. See *United States* v. *Carter, supra.* The standards that petitioners

[43] The individual petitioners also rely (Br. 40) on the district court's finding that Jones and Paisley disclosed the fact and amount of the severance payments to certain Defense Department officials. Pet. App. 21a. However, not all payments labeled as "severance" payments are either lawful or unlawful under Section 209. Petitioners do not allege that Paisley and Jones disclosed to Defense Department personnel the essential characteristics that rendered the payments at issue here unlawful. Moreover, although petitioners argue that Paisley and Jones received informal assurances that they could accept the payments, they neither requested nor received a formal written opinion to that effect from the Designated Agency Ethics Officer for the Department of Defense, the only Department official authorized to decide that question. See 32 C.F.R. 40.5(b). See also 5 U.S.C. App. 402(b)(8) (OGE advisory opinions). Inexplicably, the individual petitioners also rely (Br. 42) on disclosures made by Boeing in 1981 to the Defense Contract Audit Agency (DCAA) about the nature of its severance-pay practice. Those disclosures were made only after Boeing charged the first three of the payments at issue here to the government and after the DCAA questioned the basis for the payments.

Boeing also argues (Br. 35) that "disclosures" insulate it from liability. Although the record contains some correspondence on the subject (J.A. 541-583), the payments for the most part are not described in much detail. Moreover, a 1973 letter from a Boeing official to the General Counsel of the Air Force states that a Boeing employee had been told by a Defense Department official that a severance payment might violate Section 209 if it was based on the difference between the employee's Boeing and federal salaries (J.A. 542). The record contains no response to that letter or any other document stating that Defense Department officials formally approved payments having the characteristics that render those at issue here unlawful.

violated here, however, are prescribed by an Act of Congress, not the common law. Section 209(a) prohibits all supplementations of salary as compensaton for federal services, not merely those that are "secret." Although a court might apply common-law principles in a cause of action by the United States in the absence of statutory guidance, Congress may displace or expand upon the common law, and it has done so here. Compare *Milwaukee* v. *Illinois,* 451 U.S. 304, 313-314 (1981). In any event, even under common-law principles, an agent is not excused from liability in the absence of "full disclosure." As the court of appeals recognized (Pet. App. 9a), "full disclosure" entails a "complete" account of all relevant facts to the government official given "clear actual authority" by statute or regulation to waive the statutory requirement, and an "official response" from that official explicitly waiving the conflict. *United States* v. *Kenealy,* 646 F.2d at 705. Cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938) ("intentional relinquishment of a known right"). Petitioners satisfied none of those requirements. In sum, there was no waiver, or basis for waiver, here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 209 (1982 & Supp. V 1987) provides:

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Public

Law 85-507, 72 Stat. 327; 5 U.S.C. 2301-2319, July 7, 1958).

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

2. 18 U.S.C. 1914 (1958 ed.), which was the predecessor to 18 U.S.C. 209(a), provided:

> Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
>
> Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States—
>
> Shall be fined not more than $1,000 or imprisoned not more than six months, or both.

APPENDIX B

Opinions of the Office of Legal Counsel

2 Op. O.L.C. 267 (1978)

November 29, 1978

78-62 MEMORANDUM OPINION FOR THE DIRECTOR, PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

Supplementation of Salary of Government Employees (18 U.S.C. § 209)—Propriety of Employer Providing Certain Benefits to Employee Serving as a White House Fellow

This responds to questions raised by your Office and the General Counsel of an Executive department regarding certain benefits an employer proposes to make available to one of its employees in connection with service as a White House Fellow. The suggested arrangements are embodied in the employer's guidelines on leave of absence contracts for its employees on temporary Government assignments. We are unable to accept as legally permissible a number of its features.

Apparently, the most important aspects of the proposed arrangement from the employee's point of view are those providing for the employer to reimburse her for the cost of temporary living quarters while in Washington and for travel to her home during the year. We understand that her husband will continue to work in New Jersey and live in their home there during the year. The employee points out that her husband's desire to keep his present job and his resulting inability to move to Washington will occasion the trips home, and likewise prevent her from renting the house in New Jersey thereby avoiding lodging expenses for the family in two locations. While we sympathize with the employee's situation, we do not believe that these special arrangements are permissible under 18 U.S.C. § 209.

Whatever the reasons, the decision of the employee to reside in two different locations is a personal one. As a legal matter, § 209, in our opinion, prohibits a private employer from providing at its expense a Federal employee with travel for personal reasons where, as here, that travel is furnished on account of the

employee's Federal assignment. Whether the travel is for vacation, family, or other personal reasons is irrelevant for purpose of the statute.

Similarly, we do not believe that the employee may be reimbursed for temporary living quarters in Washington. The payment of a Government employee's living expenses due to his Government service is a classic example of a supplementation of Government salary prohibited by § 209.

It has been suggested that the employer's rental of an apartment in Washington is merely a payment in lieu of the cost of moving household belongings to Washington. Because payment of moving expenses has previously been authorized by us, the argument proceeds that the payment of living expenses in Washington in lieu of moving costs should also be permitted.

We recognize that our 1976 letter to your predecessor stated that a company may pay a participant's moving expenses to the location of the fellowship assignment and back at the conclusion of the year. Upon reexamination, we no longer believe that the policy of paying all moving expenses conforms to the intent of § 209. However, we see no legal objection to the payment of the actual expenses of returning to the employer's place of business at the conclusion of the fellowship year because the payment of relocation expenses is a rather common practice in the private sector.

However, payment of expenses of moving to Washington to work for the Government presents a different question. As a rule, the Government cannot pay moving costs; newly hired Federal employees must ordinarily bear those expenses themselves. Payment of these expenses by a private firm therefore would bestow a substantial benefit on the individual. When this benefit accrues solely because of Federal service, § 209 prohibits the arrangement.

We recognize that White House Fellows enter Federal service for only a brief period with the expectation of returning to their previous employers. By § 209(c), Congress created an exception from the prohibitions in § 209(a) for special Government employees, who are persons employed or retained for not to exceed 130 out of any ensuing period of 365 days. In view of Congress' express recognition of the unique status of certain short-term employees, it is not legally possible to fashion additional exceptions administratively for other short-term employees who do not fall within that exception.

Nor do we believe that a special construction of § 209(a) is warranted in order to further the purposes of the White House Fellows program. If that program had any special statutory authorization indicating that certain outside financial assistance is permissible, then perhaps modifications in the application of § 209(a) would be warranted. But the program, which is authorized only by Executive order, warrants no implied exception to an act of Congress.

We also recognize that current participants in the White House Fellows program may have relied upon past practice in accepting moving expense reimbursement. But we would suggest that next year's participants be advised in advance of the legal restrictions identified herein.

In the interim, we are unable to extend the reasoning of the 1976 letter to other reimbursements, such as those for apartment rental in Washington. We should point out that the letter did not suggest that every participant in the fellowship program is entitled to some reimbursement from his previous employer, or that the payment can be for a variety of purposes, such as moving expenses, rent, or for some other items. Regardless of the controversy over the legality of paying moving expenses under § 209(a), the payment of a Federal employee's living expenses while in Washington is, as pointed out above, a classic example of salary supplementation and therefore § 209(a) applies.

It has also been suggested that payment of expenses for temporary quarters in Washington is no different in principle from a firm renting an employee's permanent residence which he vacates during his period of absence as a White House Fellow, which we concluded in the 1976 letter is lawful. We must disagree. When the company arranges for the rent of the permanent residence, or rents the residence itself, the employee should

be left in no better position than he would be in if he rented the residence directly to an individual tenant. For example, the employee should bear any rental or management fees entailed in the firm's renting the residence to an individual tenant; and if the arrangement provides for the firm to rent the residence and leave it unoccupied, the fair market rental should be reduced by a reasonable estimate of maintenance and other costs that forseeably will not be incurred.

Implicit in the conclusion stated in our 1976 letter that it is permissible for a company to rent the vacated permanent residence of a White House Fellow was the understanding that the arrangement must be essentially the same as though the residence were rented on the open market and that the employee will therefore not have the use of the residence during the rental period.[1] In this case, however, the family *will* have the use of the permanent residence. The employer could not, therefore, properly pay the employee the rental value of the home; this would confer a windfall that would not otherwise result. Thus, the reimbursement of temporary lodging costs in Washington cannot be justified by reference to situations in which the private employer may rent the White House Fellow's permanent residence.

Several other aspects of the employer's guidelines are also troublesome. We may question, for example, the continuation of concession telephone service provided by the company for a person in Government service. Section 209(b) permits a Government employee to continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." It may be argued that concession telephone service is a "benefit plan" maintained by the employer. However, the purpose of § 209(b), suggested by the

[1] Also implicit was the understanding that the employee was prepared to rent the house to a tenant who would reside there, so that the employer would not be paying the employee for a residence the employee intended to leave vacant. In the latter situation, the employer's payment of rent may disguise a supplementation of Government salary.

enumeration of benefit plans in the subsection itself, is to permit persons entering Federal service to continue established security arrangements that are often essential to long-range financial planning for the family. *See* R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1139-42 (1963). Concession telephone service is, we believe, far removed from this purpose.

We also note that the suggestion in the guidelines that a person returning to the employer after Government service would be entitled to vacation days in an amount equal to the difference between what he would have accrued and what he actually used (or was paid for) while in Government service is inconsistent with the advice of our 1976 letter. We continue to believe that the accrual of vacation time from a private employer under these circumstances constitutes a supplementation of salary prohibited by § 209. For similar reasons, we do not believe that the employer may pay for sick leave due to any absence on account of service over the amount accrued from the Government, as is contemplated in the guidelines. We do not, however, object to the provision for termination of the leave of absence and reinstatement on the employer's payroll in the event of a long-term absence.

In our view, a problem of salary supplementation also arises in those portions of the guidelines providing that coverage under the basic group life insurance plan and death and pension benefit plans will be calculated on the higher of the employee's Government or his private salary. Section 209(b) permits "continued participation" in a "bona fide" benefit plan maintained by a former employer. The concept of "continued participation" would appear to require that participation is to be based on the employee's private salary under all circumstances. The salary on which these figures are based must in turn be calculated without reference to Government service.

Several other features of the guidelines are unclear. It is provided that the employer will make a lump sum payment equal to the contribution that would have been made to the employer's savings plan had the employee remained on its payroll. To

whom is the lump sum to be paid? If the payment is to be made directly to the employee under circumstances in which he would not otherwise be entitled to have access to the funds, this would not appear to be "continued" participation in the savings plan. Similar questions are raised by the provision of the guidelines for payment of the cash equivalent of the Employees Stock Ownership Plan participation the individual would have earned at his previous year's salary. In both these provisions and in the provision dealing with net credited-service, we also have some doubt that an employee actually "continues" to participate in the benefit plans if he does not receive credit for the period of Federal employment until he returns to the company.

A final ambiguity concerns the meaning of the term "educational fees" in the guidelines. Some further justification of miscellaneous reentry expenses mentioned also seems necessary.[2]

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

[2] Public Law 96-174, 93 Stat. 1288 (1979), amends 18 U.S.C. § 209 by providing that it does not prohibit the payment of actual relocation expenses of participants in an executive exchange or fellowship program. *See* H. Rept. No. 96-674 (1979).

5 Op OLC (1981)

Payment of Moving Expenses as Supplementation of a Government Officer's Salary

* * * * *

May 21, 1981

MEMORANDUM OPINION FOR A PROSPECTIVE DEPARTMENT OF JUSTICE OFFICER

You have asked us to advise you concerning the propriety of the proposed payment of your moving expenses by your present employer, University X, in anticipation of your nomination, confirmation, and service as an officer of the Department of Justice. We understand that during your tenure as an officer of the Department you would be on a leave of absence from the University, and that the payment of your moving expenses would be made pursuant to the University's "Professional Development Program." You have provided us with the portions of the University handbook that describe this program, and by letter you have described your school's policy and practice in administering the program. In light of this information, upon which we have relied, we conclude that the proposed pay-

ment of moving expenses[1] is acceptable under 18 U.S.C. § 209 and under this Department's Standards of Conduct, 28 C.F.R. Part 45.

As you know, 18 U.S.C. § 209 prohibits a government employee from accepting "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch." It is our view that the payment of moving expenses may constitute a supplementation of salary within the purview of § 209, if the payment is made "as compensation for" federal employment. *Cf.* § 209(e). On the other hand, if the payment is made for past or future services to a private employer, without regard to the recipient's governmental duties, then it would not be prohibited by § 209. *See, e.g.*, 41 Op. Att'y Gen. 217 (1955). Since it is difficult to ascertain the true motivations behind any given payment, we generally discourage the acceptance of moving expenses from former employers. However, if it can be demonstrated that moving expenses are contractually or routinely paid by the private employer to departing employees, that the purpose of these payments is other than to compensate federal employment, and that the entitlement and amount of payment do not favor federal employment, then we will approve the payments under § 209. In our judgment, the proposed payment by University X meets these standards.

The University's Professional Development Program apparently was intended to serve in lieu of a university sabbatical program. It is clear both from the provisions of the plan, and from the traditional function of sabbaticals, that the primary purpose of such programs is to enhance the quality of service that the employee will render to the institution upon return from the leave. In this regard we note that University X's plan requires subsequent service, and provides for the evaluation of leave applications based upon their potential contribution to the goals and stature of the University. The materials you have provided also demonstrate to our satisfaction that University X's

[1] We assume that the University's payment will not exceed your actual moving expenses and that it will be otherwise reasonable in amount.

plan compensates faculty for moving expenses with some regularity, and that it is not designed or administered to favor federal employment over other forms of professional development leave. Your letter explains that your school's policy has been to pay the moving expenses of faculty on professional development leave whenever those expenses are not paid from another source. In addition, you have advised us in telephone conversations that the vast majority of the University faculty who have taken professional development leave have done so to undertake projects other than federal employment. In light of these representations and our understanding of the purpose of the plan, we conclude that the University's payment of your moving expenses would not be compensation for your federal employment in contravention of § 209.

In addition to the proscriptions of § 209, the Justice Department's Standards of Conduct require that employees avoid financial interests that create a conflict of interest with their governmental duties, 28 C.F.R. § 45.735-4. We are aware of [no] immediate or anticipated conflicts that would be created by your continued affiliation with University X or by its payment of your moving expenses. However, should any matter affecting the interests of University X come before you in your official capacity, you may be required to disqualify yourself from any official participation in the matter. § 45.735-5. If such a situation arises, we will be available to advise you about it.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Aug. 7, 1974

Mr. Robert E. Montgomery, Jr.
Acting General Counsel
Federal Energy Administration
Room 5101
New Post Office Building
12th & Pennsylvania Avenue, N.W.
Washington, D.C. 20461

Dear Mr. Montgomery:

I am responding to your letter of July 19 to the Attorney General regarding a legal issue attendant to the proposal that * * * be nominated as * * * of the Federal Energy Administration. It appears that * * * came to the Government on * * *, and is presently serving as * * *. Prior to his federal employment, he had been employed for 13 years in a variety of Executive positions by * * * and its predecessor * * *.

The legal issue arises out of a lump sum severance payment of $90,000 made to * * * by * * * when he resigned to come to the Government. The issue is whether the payment could properly be considered as subject to the prohibition of 18 U.S.C. 209(a). That subsection reads in pertinent part as follows:

> "(a) Whoever receives any salary, or any contribution to or supplementation of salary *as compensation for his services* as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States * * *; or Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—" [Emphasis supplied.]

is guilty of a misdemeanor. What must be considered is whether the severance payment to * * * by * * * could be regarded as a

salary supplement in consideration of his government employment, prohibited by 18 U.S.C. 209(a).

At the outset it must be noted that * * * and * * *, sensitive to questions relating to the * * * payment, requested and received from the then Federal Energy Office an advance assurance that the payment would not violate the conflict of interest laws. It was only after this assurance was received that the payment was made. Despite the reservations concerning the payment hereafter discussed, it is the position of the Department of Justice that an investigation concerning possible violation of 18 U.S.C. 209(a) is not warranted in the circumstances.

On the basis of the facts you have presented to us, * * * received his payment pursuant to a long-standing * * * policy embodied in a formal document entitled "Public Service Leave of Absence and Termination Policy" covering employees who leave that Company to undertake various public service positions, both governmental and private. Under that policy, an employee who terminates his employment to accept public service receives a lump sum payment "in consideration of his past service." The payment is no less than one-quarter of one month's pay multiplied by the number of years of service and no more than twenty-four month's pay.

At the time he left * * *, * * * had thirteen years of service and was receiving a salary of $57,500. In addition, he had certain stock option rights and was entitled to certain bonuses. The payment of $90,000 is clearly higher than the minimum payment authorized under the * * * policy, but lower than the maximum of twenty-four months' pay.

You have advised us that the payment was calculated in the manner customarily used for senior executives who terminate for public service, whether governmental or private, or even for medical reasons or because of a reduction in force. In * * *'s case the calculation began with one month's salary multiplied by his years of service ($62,300). To this was added the amount of bonus income that he would lose for the year 1973 ($11,000); an amount representing the value of his stock options lost ($10,900); and a resettlement payment ($5,000). The total sum

of $89,200 was then rounded off to $90,000. On the foregoing facts, it appears that the payment was not based directly on the difference between * * *'s salary and his governmental salary—which would be a clear violation of 18 U.S.C. 209(a)—but rather on a customary formulation of severance pay under the long-standing public service termination policy.

The question remains whether nevertheless the payment may be viewed as a supplement to government salary for federal services even though salary differential did not enter directly into the calculation of the payment. Our concern in this regard is prompted, in part, by a * * * in which an * * * official is described as having characterized the payment to * * * as "based in part on the difference between his income at thc company and his new salary in the government." This clearly suggests a supplement as compensation for his government service, the very thing 18 U.S.C. 209(a) prohibits.

In a letter to the Federal Energy Administration dated July 26, 1974, * * * explains this statement as reflecting the general policy behind the Public Service termination policy rather than a specific consideration in * * * case.

> This statement must be read in context with the underlying purpose of the * * * policy on termination pay. The purpose of that policy is to reduce the potential barrier to leaving * * * by alleviating the economic hardship incurred by an employee when he terminates his employment in mid-career. When an individual will be going to other employment after termination, whether private or public, we test the appropriateness of the indicated termination payment by references to the individual's probable economic situation after termination. In other words, if there were no economic loss there would be no payment.

* * * goes on to explain that the fact that * * * would be receiving less pay in government was taken into account in deciding *whether* there would be a payment but not in *calculating* the payment.

The interpretation of 18 U.S.C. 209(a) in light of the facts relating to * * * is difficult. We do not have the obvious violation involved in an *ad hoc* payment to an individual, whether by

lump sum or over a period of time, directly designed to provide the difference between his private industry and government salaries. Rather we have a payment made under the customary formula implementing a long-standing policy. In Manning, *Federal Conflicts of Interest Law,* p. 168, it is suggested that this may be determinative in deciding whether the statute has been complied with. Similarly, it appears that the * * * policy would provide payment not only to one entering government service but also to one going to an academic institution or a charitable foundation. In Perkins, *Federal Conflict of Interest Law,* 76 Harv. L. Rev. 1113, 1139, it is asserted that such a policy is not in violation of the law. He notes, that the Department of Justice had taken a stricter view on a substantially similar predecessor statute, 18 U.S.C. 1914. *Ibid.* Prior opinions of the Attorney General dealing with that statute, however, suggest that mere cognizance of the lower government salary does not, per se, contaminate an otherwise proper payment. 39 Op. A.G. 501; 38 Op. A.G. 294.

On the other hand, 18 U.S.C. 209(a) does not, by its terms, distinguish between payments calculated specifically with respect to the difference between the private industry and government salary and payments made generally in consideration of the lower government salary. It appears to prohibit any supplementation of salary made because of government service. The * * * policy of making termination payments only when "economic hardship" will result from public service suggests a supplementation of salary which, in this case, relates to government service.

While we do not question * * *'s good faith in this matter, we do have reservations concerning technical compliance with 18 U.S.C. 209(a) in this instance. Since there are respectable arguments, based on existing authorities, that the payment is permissible, however, and there is positive evidence of sensitivity on * * *'s part concerning possible conflict of interest problems, we suggest that the entire matter be laid before the appropriate Senate Committee for its consideration.

This matter has alerted us to the difficulty in ascertaining the precise application of 18 U.S.C. 209(a) to particular fact situations. We are told that termination payment formulae similar to * * * formula are common in industry. In our view, however, although precise guidelines may be difficult to construct, there are certain features of termination plans which would seem to be suspect and to merit special examination, *e.g.*, explicit consideration of a gap between industry salary and prospective government salary, consideration of non-vested industry fringe benefits to be forfeited upon entry into government, consideration of hardship entailed in resettlement costs, any payment so large as not to be easily explicable as a reward solely for past service. We believe these factors warrant critical scrutiny despite the authorities previously adverted to in this letter which suggest a narrow view of 18 U.S.C. 209(a).

We feel that in instances like the * * * case there is a need to implement more effective review and clearance procedures, so that more explicit guidelines can be developed by experience. Difficulties of the sort posed by this case could be avoided or minimized if, in the future, the Office of Legal Counsel of the Department of Justice were consulted prior to the payment of such sums and the nomination or appointment of persons in * * *'s situation. It must be remembered that the Government has an obligation not only to avoid violations of the conflict of interest laws but also to prevent situations having the appearance of conflict of interest.

Sincerely,

Mary C. Lawton
Acting Assistant Attorney General
Office of Legal Counsel

Oct. 21, 1974

Robert E. Montgomery, Jr., Esq.
General Counsel
Federal Energy Administration
Washington, D.C. 20461

Dear Mr. Montgomery:

This responds to your letter of September 16 concerning a recommendation that the President nominate * * * to be * * * Federal Energy Administration (FEA). * * * now is * * *. The question is whether, under the provisions of * * *'s employment contract with * * *, its general policy and its own interpretation of that policy, a termination allowance which * * * proposes to provide * * * on his resignation to join FEA, would be contrary to 18 U.S.C. 209.

For reasons to be discussed, we conclude that payment and receipt of the allowance would not violate section 209(a), and is permitted by section 209(b).

Subsection (a) of section 209 prohibits an officer or employee of the executive branch from receiving from any source other than the Government "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee." Subsection (b) of section 209 establishes certain exceptions by permitting an officer or employee to continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer."

The statute reflects a balance struck by the Congress in order to facilitate the employment by the Government of qualified persons without relaxing basic ethical standards or permitting actual conflicts of interest. While supplemental compensation from an outside source is forbidden, the sacrifice of conventional fringe benefits from a previous employer is not required.

Your letter and the accompanying documents set forth in detail the facts and circumstances surrounding the proposed termination allowance of $225,606.70, which would be paid by * * * to * * * in 42 consecutive monthly payments, should he be appointed and leave the company on October 31, 1974. Before joining * * * as * * * in 1969, * * * served as President, and subsequently as Chairman of the Board, of * * *. By reason of this service (about 10 years and 7 months), he had accrued substantial retirement and disability benefits. In consideration of his willingness to accept employment with * * *, that company, in its February 25, 1969 employment contract with * * *, agreed that he would be eligible for benefits under its Employees Security Plan (the "Plan") as though his years of service with * * * had been spent with * * *. On September 24, 1974, * * * with knowledge of * * *'s intent to accept an appointment as * * * of FEA, entered into an agreement (the "Agreement") with him by which it terminated their employment relationship effective October 31, 1974, and thereby rendered him eligible for payments under the Plan.

In their express terms, the Contract and the Plan did not, strickly speaking, establish any entitlement to the allowance here at issue until the September 24 Agreement was executed. The Plan is applicable only to an employee "whose service is terminated by the Company" (Paragraph D) and the Contract likewise provides for payment under the Plan only "if the Employee's service be terminated by the Company for any reason other than for cause" (Paragraph 5). Thus, if the Company had refused to execute the September 24 Agreement, and if * * * himself had formally terminated the Contract, it would initially appear that the benefits would not have been available. The Chairman of the Board * * * however, has advised you that it is and has been the Company's understanding under the Contract that * * * would receive a termination allowance under the Plan (or a complementary Pension Plan) if he left the Company for any reason other than being dismissed for cause. You have furthermore advised us that when a voluntary departure has been proposed by a senior employee, it has been a prac-

tice of * * * to "terminate" the employee's contract pursuant to his request, and to pay the benefits allowable under the Plan; and that this has been done even in the case of departures to accept employment with other companies. If this practice were sufficiently consistent and well-known, or if the understanding of * * *'s employment Contract contained in the statement of the Company's Chairman of the Board could be established in court, it might be that * * *'s absolute entitlement to have entered the Plan could be demonstrated; in which case payments under the Plan (subject to other points discussed below) would, in our view, clearly qualify for this section 209(b) exemption.

Because this conclusion of prior entitlement depends on various elements of fact and of * * * law which we do not have before us, we are not prepared to render our opinion on this basis. Nevertheless, it is not the requirement of section 209(b) that initial application of the benefit plan to the employee be absolutely mandatory, but only that the plan be "bona fide." This means, in our opinion, that it must be a standardized plan generally applied—neither designed specially for the employee in question, nor applied exceptionally to him by reason of his Federal employment. This requirement is consistent with the retention of some discretion on the part of the previous employer—at both the stage of initial application of the plan and subsequently—so long as exercise of that discretion conforms to a practice which shows that it is not being used to induce or influence Government employment. We understand that to be the case with respect to the termination device in this instance. Given the Company's practice described above, it is presumably designed to enable the Company to decline to terminate an employee's contract (thereby forcing him to initiate the termination and render the Plan inapplicable) if he is resigning in disregard of the Company's urgent needs, or if he is leaving because of malfeasance but the Company does not wish to incur the risk of litigation by dismissing him on that ground. For these and similar purposes, the "Company termination" provision is a useful device; it may well be a common one. In the circumstances of the present case, we are of the view that it does not prevent the Plan from being "bona fide."

The Plan itself contains a further element of discretion on the Company's part. Even when it is applicable, the departing employee is eligible for payments only "if the Company shall so determine" (Paragraph D); and the Company reserves the right to modify or terminate payments at any time (Paragraph O). While at least the former discretionary provision seems clearly eliminated insofar as * * * is concerned by Paragraph 5 of the Contract, the latter may subsist. Moreover, if the former were generally applied to other employees, there would be some question whether the Plan was "bona fide" within the meaning of section 209(b). You have advised us, however, that both these elements of discretion on the part of the Company are intended to reflect the fact that the Plan is not a "fully funded or trusteed system"—that is, that the Company does not guarantee the existence of funds to commence or continue payments. Assuming that the discretion is regularly used only for this purpose, and perhaps in exceptional circumstances to deny payments to an employee who for some reason such as those described in the preceding paragraph may not be deserving, this would not, in our opinion, eliminate the Plan's character as a "bona fide . . . welfare or benefit plan."

Finally, we note the circumstance that the September 24 Agreement, in addition to effecting the Company termination essential for applicability of the Plan, raised * * *'s annual salary from $117,000 to $130,000, effective September 1, 1974. This has the effect of increasing the benefits payable under the Plan, and if it were done solely in contemplation of * * * anticipated Federal employment it would raise serious question under the conflict of interest law. As the Agreement reflects, however, this increase represents merely the restoration of * * * salary to its level in 1973, after which there was a 10% reduction. You have advised us that the reduction, attributable to temporary financial conditions, was generally applied to all of * * *'s senior officers, and that the restoration is similarly general. We note, moreover, that the increase merely enables * * * to receive termination benefits based on the highest annual salary he received during the term of his employment, which is of course normally

the terminal salary. Even if the restoration were initially applied only to * * *, if its purpose was merely to eliminate this unusual differential between his highest salary and his salary upon termination, it would in our view not vitiate the Plan.

On the basis of the facts set forth above, and those contained in your letter of September 24 and the attachments; and in particular assuming the existence of a Company practice of terminating senior employees who wish to resign in order to accept other employment; it is our opinion that the payments to be made to * * * under * * *'s Employees Security Plan will be payment under a "bona fide . . . employee welfare or benefit plan maintained by a former employer," and by virtue of 18 U.S.C. § 209(b) will not constitute any violation of Federal conflict of interest law.

We conclude that section 209 does not preclude payment of the proposed termination allowance to * * *. We note, however, that * * *'s entitlement to payment under the company Plan does constitute a "financial interest" in * * * which, under 18 U.S.C. 208(a), precludes his participation in a particular matter involving that company unless he obtains a waiver under 18 U.S.C. 208(b).

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

May 10, 1976

James A. Wilderotter, Esq.
General Counsel
Energy Research and Development
Administration
Washington, D.C. 20545

Dear Mr. Wilderotter:

This responds to the request of your office of March 25, 1976, for our opinion as to the legality, under 18 U.S.C. § 209(a), of a payment of $84,000 which the * * * proposes to make to * * *, a present employee of * * *, should he terminate his employment with * * * and accept employment with your agency as * * *. It is our understanding that as * * *, * * *'s duties would consist primarily of overall responsibility for three projects under the jurisdiction of that division: the Clinch River Breeder Reactor Plant, the Fast Flux Test Facility and the Prototype Large Breeder Reactor. We further understand that * * * holds a major subcontract for the Clinch River Plant and a design contract for the Prototype Large Breeder Reactor.

The proposed payment to * * * would be made pursuant to a 1969-1970 * * * plan entitled "Service with the Federal Government by * * * Employees." This plan authorizes "severance allowances" to * * * employees who terminate their employment with * * * to accept positions in the federal service. The plan states that the allowances are to be made "solely on the basis of past service" to the company. Whether an allowance will be granted to a particular employee is a discretionary decision of the * * * Pension Board. No allowance may be granted, however, unless the position which the employee undertakes in the federal service is "a key position of a technical, advisory, executive, administrative or professional nature." The stated purpose of the plan is to encourage * * * employees, in appropriate cases, to undertake such federal service.

The question raised concerns the application of § 209(a), which reads as follows:

> "Whoever receives any salary, or contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, or
>
> "Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> "Shall be fined not more than $5,000 or imprisoned not more than one year, or both."

Section 209(a) in its present form was enacted as part of the 1962 revision of the federal conflicts of interest laws. Public Law 87-849, 87th Cong., 2d Sess. 1962, 18 U.S.C. §§ 201 et seq. In essence, the statute prohibits any payment to an individual from a private source *as compensation for* his service as an officer or employee of the executive branch of the government. The prohibition now embodied in § 209(a) first appeared in the Legislative, Executive and Judicial Appropriation Act of March 3, 1917, 39 Stat. 1106.[1] The object underlying this earlier pro-

[1] This predecessor of § 209(a) provided: "That on and after July first, nineteen hundred and nineteen, no Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the

hibition was stated by the Attorney General to be "that no government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States."[2] The immediate predecessor of § 209(a) was 18 U.S.C. § 1914, virtually identical to the 1917 prohibition; it provided:

> "Whoever being a government official or employee receives any salary in connection with his services as such an official or employee from any source other than the government of the United States, except as may be contributed out of the treasury of any State, county, or municipality . . shall be fined not more than $1,000 or imprisoned not more than 6 months, or both."

services performed by him for the Government of the United States." The provision was codified as former section 66 of title 5, United States Code. Violation was a misdemeanor. Unlike § 209(a), it applied to all government officers and employees in whatever branch. The exception for payments made by local governmental units was thought necessary to preserve programs such as the agricultural extension programs. *See*, Manning, *Federal Conflict of Interest Law* at 172 (1984).

[2] 33 Op. A.G. 273, 275 (1922). A more elaborate statement of this principle is found in Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (1960) at 211-212:

> "The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration."

The Supreme Court has stated that this prohibition, among others, was "directed at the crime of bribery in its open or subtle form." *Muschany* v. *United States*, 324 U.S. 49, 68 (1945). See also H.R. Rep. No. 748, 87th Cong., 1st Sess. 6 (1961).

Despite certain differences in language between the two provisions, the legislative history of § 209(a) reflects that its meaning was not intended to vary in substance from that of § 1914.[3] There has been almost no judicial construction and little published administrative interpretation of § 209(a). Such material with respect to its predecessor is also limited, but is of some help in understanding the scope of the present prohibition. We are unaware, however, of any official published interpretative material dealing with the present issue of severance payments.

For the purpose of evaluating under § 209(a) payments made by an employer to a departing employee, one difference between the current provision and § 1914 should be noted. While the latter prohibited payments "in connection" with an individual's government service, § 209(a) prohibits payments made "as compensation for" an individual's government service. The change appears simply to have been intended to remedy what was thought to be the imprecision of the former phrase.[4] Opinions of the Attorneys General under § 1914, however, had expressed views consistent with this more precise wording of the prohibition. One such opinion stated "that no violation of the statute arises from the mere coincidence of Government employment and receipt of compensation from a private employer. No violation is present unless a connection is shown to exist between the public employment and private compensation."[5] In making clear that the "connection" between the pay-

[3] See Department of Justice Memorandum re the Conflict of Interest Provisions of Public Law 97-849, 18 U.S.C. § 201 note. See also S. Rep. No. 2213, 87th Cong., 2d Sess. 14 (1962); Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1138 (1963).

[4] See S. Rep. No. 2213, *supra*; H.R. Rep. No. 748, 87th Cong., 1st Sess. 24-25 (1961).

[5] 41 Op. A.G. 217, 220 (1955). This opinion involved the members of an advisory committee to the Secretary of Agriculture composed of industry

ment and public employment is that the former is made *as compensation for the latter,*[6] the revision was simply codifying the advice rendered by the Attorney General under the predecessor provision, that the statute prohibits payments "received from a private person or source if it is paid or received as compensation or part compensation for the services rendered to the Government. . . . It does not, however, prohibit payments for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government."[7]

Thus, a payment in fact made solely in consideration of past service to a private employer, even if made at a time when the recipient is a government officer or employee, is not prohibited by § 209(a); and a payment made wholly or partly as compensation for the government services is a violation. Obviously, the issue turns upon the intent of the parties.[8]

The statutory phrase "as compensation for" assuredly embraces the situation in which federal service is "consideration" for the payment in the classic contract sense—and, as later discussion will suggest, that may be sufficient to dispose of the immediate case. But the statute also goes well beyond that. There is little doubt, for example, that a payment for governmental action previously taken by a Federal official would

representatives who neither received compensation or other emoluments from the Government, nor took an oath of office. The question was whether § 1914 barred them from receiving their usual salaries from their private employers. While the Attorney General did not specifically address the issue of whether the members were Government officials or employees, he held that even if they were regarded as such, the mere receipt of salary from a private organization while serving as a member of the committee "cannot be in itself a violation of the statute. . . ." Under § 209(c), it should be noted, "special government employees" or those serving without compensation are not subject to the prohibition of § 209(a).

[6] See Manning, *Federal Conflict of Interest Law* at 163 (1964).

[7] 40 Op. A.G. 187, 190 (1942). The quoted language is only dictum, since the question was whether a government official was prohibited by statute from engaging in a private business activity for compensation.

[8] See 41 Op. A.G. *supra*, at p. 221.

violate § 209, even though that action could not constitute "consideration," since it was not bargained for.[9]

Advisory opinions relating to § 209 matters, in which the intent of the parties is the crucial issue, must ordinarily be based upon the inference which can reasonably be drawn from the circumstances surrounding the payment.[10]

The usual severance payment, made without taking account of the anticipated future status or activity of the departing employee, obviously presents no difficulties. It is clear that the entire basis for the payment is the past service which the employee has rendered. Ordinarily, however, conditioning the payment upon a future status or activity which can be of benefit to the employer suggests that the payment is in part classic "consideration" for undertaking the status or activity. In addressing what is essentially this same issue in another context, Williston says the following:

> It is often difficult to decide whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which interpretation of the promise is more reasonable, is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. I Williston, Contracts § 445 (3d ed. 1957).

Moreover, even where the granting of a severance payment is not explicitly conditioned upon a particular future status or activity, retention by the employer of a complete discretion to determine whether a departing employee will receive payments, and the exercise of that discretion at a time when the employer has knowledge of the prospective subsequent status or activity of the employee, again suggests the possibility of a sufficient connection between the status or activity and the payment to support the conclusion that the one is "compensation for" the other.

[9] See I Williston, Contracts § 142 (3d ed. 1957).

[10] *Compare* 33 Op. A.G. 273 (1922) *with* 26 Comp. Dec. 43 (1919).

Applying the foregoing to the present case: A significant feature of the company plan pursuant to which the present payment would be made is that the severance allowance is available only if the departing employee enters "a civilian non-elective position with the Federal Government"—and, indeed, only such a position which is also "a key position of a technical, advisory, executive, administrative or professional nature." Even then, the allowance is not automatic, but merely discretionary, company officers making their recommendations, and the Pension Board making its determination, in light of the particular "key position" involved. All this suggests that the nature of the federal work to be performed is the inducement for the payment, the quid pro quo—in short, the consideration.

This appearance is strengthened by the nature of the governmental duties which the departing employee in this case would undertake. As noted above, they would involve overall responsibility for projects in which * * * is a contractor or subcontractor. Directly in point is the following statement of the Attorney General in an opinion under the former § 1914:

> "An important factor in determining the intent is whether the individual rendering the service to the government is in a position by virtue of his government service to assist his private employer."[11]

Of course, a matter such as this cannot be resolved conclusively on the basis of documents alone, but would require actual investigation of all surrounding facts and circumstances bearing upon intent. Such an undertaking is simply not feasible in the context of the ordinary advice-giving function of this office. Thus, we are not in a position to advise categorically that the payment in question, if made, will violate § 209(a); but we think it sufficiently probable to advise strongly against your office's giving the approval which the * * * plan contemplates.

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[11] 41 Op. A.G., *supra*, at 220 (1955). See also Davis, *The Federal Conflict of Interest Laws*, 54 Colum. L. Rev. 393, 904-05 (1954); McElwain and Vorenberg, *The Federal Conflict of Interest Statutes*, 65 Harv. L. Rev. 955, 967 (1952); Dembling and Forest, *Government Service and Private Compensation*, 20 Geo. Wash. L. Rev. 174, 191-92 (1951).

We may add for your future guidance that, because of the probabilities which ordinarily exist when conditional severance payments are made; and because of the inability of this office to conduct factual investigation of the actual intent in particular cases; we will not, as a general matter and in absence of special circumstances, give advisory approval to any severance payments which are conditioned specifically upon Federal employment or which involve discretion which permits the employer to take account of the future status or activity of the employee. This is not to imply that such payments are necessarily violative, but only that we would not be in a position to conclude that the external circumstances are substantially probative of their validity.

We might view differently an inquiry concerning severance payments which are conditioned upon a broader category of subsequent employment activity—that is, if the qualifying activities include, but are not limited to, federal service, and if the previous employer does not have any discretionary power which enables him to select the particular activities to be rewarded. We would, for example, be prepared to consider advisory approval of a payment to which a departing employee is unqualifiedly entitled when he undertakes "continuing professional employment in the field of energy research and development." In such a case, it can be argued that although federal service happens to be the means by which the particular employee qualifies, he might as easily have qualified in some other fashion, wherefore the compensation is not "for" the federal service in the specific sense which § 209(a) envisions. We leave that issue for determination in the appropriate factual context, which may include factors bearing on the question whether the employer stands to benefit proximately from the employee's government services.

In reaching our conclusion, we have considered your office's reference to a letter dated September 2, 1969, from this office to the corporate counsel of * * *, regarding the * * * plan. While the consultation which that letter reflects evidences the good faith of the company in establishing its plan in the present form, I find nothing in the letter to suggest the view that any employee

qualifying under the plan would automatically avoid the restrictions of § 209(a). Indeed, the provision in the draft which was the subject of the letter (and which appears in the final * * * plan) to the effect that the grant of an allowance "will be subject to review . . . by the employee with the appropriate Government legal officer" demonstrates that no such blanket approval was contemplated, and that each case would have to be examined upon its own facts. In any event, if there is any inconsistency between that earlier consultation and the present opinion, you should henceforth be guided by the latter in your review of proposed payments pursuant to this or similar plans.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Oct. 7, 1976

John Cho, Esq.
Assistant General Counsel for
Administration
Energy Research and Development
Administration
Washington, D.C. 20545

Dear Mr. Cho:

This is in response to your request for the views of the Office of Legal Counsel regarding the legality of a payment that was proposed to be made by the * * * to a person who was being considered for employment by the Energy Research and Development Administration ("ERDA") for a period of one to two years while on a leave of absence from * * *.

The individual, whom you did not identify by name, would have been employed as * * * in ERDA's Fossil Demonstration Plants Division. The proposed payment would have been made under the * * * Public Service Leave of Absence and Termination Policy ("Policy"), a copy of which you made available to us.

We understand that ERDA has now hired someone else for the position in question and that the issue of the validity of the particular severance payment is now moot. Nevertheless, you have indicated that you would still like to have our views on the * * * Policy in the event that a similar question should arise with respect to any future payment under the Policy. Because the legality of a severance payment under 18 U.S.C. § 209(a) turns on the intent of the parties in the particular case, we do not ordinarily express an opinion on a severance pay plan in the abstract. However, because your request related to a specific proposed payment, and because in our opinion the payment would have raised a serious question under 18 U.S.C. § 209(a), we are willing to express our views on the * * * Policy in this case.

Under Part I of the Policy, an * * * employee is eligible for a lump-sum payment if he will be assigned to a "key position of a

technical, advisory, executive, administrative or professional nature" in a "qualified organization," defined to include the following: a Federal, State or local government or instrumentality, any international organization supported by the United States, any accredited public or private college or university in the United States, and any public or non-sectarian private body engaged in health, welfare, educational or community relations programs or activities in the interest of the general public. Even if these requirements are satisfied, however, an employee will not receive a leave of absence or termination of employment under the Policy if "management determines it would be inconvenient to release the employee's services."

Part II of the Policy provides that management "will grant" an eligible employee a leave of absence if his assignment will be temporary and if his services will be desired by * * * at the end of the assignment. If an employee is eligible under the Policy but management does not grant him a public service leave of absence, management "may grant" him a public service termination under Part III. In either case, Part IV provides that "the Company will pay a lump-sum to the employee, prior to the absence or termination as the case may be, in consideration of his past services" to the Company. The purpose of the lump-sum payment, as set forth in a letter to you of March 23, 1976, from * * * is "to encourage an employee to accept a special assignment which the employee has been requested to perform by a governmental organization or by other organizations engaged in activities in the general public interest."

If the qualified organization is a United States Government agency or organization, the lump-sum payment is calculated on the basis of one-half of a month's pay per completed year of service with * * * in the case of a leave of absence and one month's pay per completed year in the case of a termination, but in no event more than a total of 24 months' pay. When the employee is to work for any other qualified organization, however, the method of calculation just mentioned is used only as a "general guideline, subject at management discretion to adjustments, based on prior review and recommendations of the Employee Relations Division or the Coordinator of Executive

Development as appropriate in each case."[1] Moreover, we understand that in practice the amount calculated under the formula just described is a maximum for employees who do not go to the Federal Government—i.e., that the only "adjustments" made by management in such cases are downward. In his letter to you of February 12, 1976, * * * states that the fixed scale with respect to positions in the Federal Government was designed to meet Federal conflict of interest standards and that the Company desired to retain discretion regarding the amount of payment in all other cases, where those standards do not apply.

The principal conflict of interest statute applicable in a case such as this is 18 U.S.C. § 209(a), which provides:

> (a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Assistant Attorney General Scalia of this office discussed the scope of this section at some length in a letter dated May 10, 1976, to Mr. James A. Wilderotter, General Counsel of ERDA.

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[1] Similarly, under Part V of the Policy, employees going to the Federal Government "will be regularly granted" relocation expenses for which they are not reimbursed by the Government, such as transportation, shipment of household items, and home sale assistance. Such payments are within management discretion when the qualifying organization is not a Federal agency.

In that letter, he advised against ERDA's approving a lump-sum severance payment of $84,000 to be made under a * * * plan which authorized such payments to * * * employees who terminated their employment to accept "a key position of a technical, advisory, executive, administrative or professional nature" with the Federal Government. In his view, the fact that the plan was limited to key positions in the Federal Government suggested that the nature of the Government work to be performed was the inducement for payments, especially since management had discretion whether or not to make a payment in any given case in light of the particular key position involved. It therefore appeared that the severance payment could properly be regarded as "compensation for" the individual's services to the Federal Government within the contemplation of 18 U.S.C. § 209(a).

The * * * Policy is not by its terms limited to positions in the Federal Government, although employees accepting such positions are in a sense preferred because only they are guaranteed the maximum financial benefits under the Policy. Mr. Scalia indicated in the May 10 letter that he might consider advisory approval of a severance payment conditioned on a broader category of qualifying activities, including but not limited to Federal service. In such a case it could be argued that although Federal service happens to be the means by which the employee qualifies for the payment, he might as easily have qualified in some other fashion, so that the compensation is not "for" the Federal service in the specific sense that section 209(a) might be thought to envision. At the same time, however, he recognized that if a plan which on its face permits payments to be made for a broad range of qualifying activities but at the same time gives the employer broad latitude to determine whether a payment would be made in a given case, the employer would be in a position to reward specific activities, including Federal service. Therefore, it was his view that the exercise of discretion whether or not to make a given payment at a time when the employer has knowledge of the subsequent status or activities of the employee suggests the possibility of sufficient connection between the

status or activities and the payment to support the conclusion that the one is "compensation for" the other. Because of this possibility, and because of the difficulties in ascertaining the subjective intent of the parties with respect to any given payment made under a facially neutral plan, he advised that this Department would not as a rule give advisory approval to severance payments to be made under a plan permitting the employer to take into account the future status or activities of the employee. The * * * Policy has this type of discretion built in at several stages.

First, as mentioned above, an * * * employee whose proposed activity is determined by * * * to be in a key position with a qualified organization is nevertheless ineligible for payments if "management determines it would be inconvenient to release the employee's services." The Policy sets forth no standards for this determination, which presumably is made at a time when management is aware of the employee's proposed undertaking. We note too that Part III of the Policy provides that if an employee is eligible for payments but management does not grant him a public service leave of absence,[2] management "may grant" him a public service termination. This obviously permits discretion in another principal aspect of the plan. Finally, as noted above, management has considerable latitude in determining the amount of payment in all cases except those involving Federal positions.

Because of these provisions in the * * * Policy granting management latitude in administering the Policy and because of the preferential treatment for employees who take positions with the Federal Government, payments under the * * * Policy

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[2] Part II of the Policy provides that management "will grant" a public service leave of absence if the assignment is temporary, if the employee will avoid conflicts of interest, and if the company will desire his services after the leave of absence is over. It is not clear whether management can deny a public service leave of absence to an eligible employee only if one of these three conditions is not satisfied, or whether Part III implies a broader power to withhold approval.

would in our view raise such a serious question under 18 U.S.C. § 209(a) that this Department could not approve them.

Sincerely,

Leon Ulman
Acting Assistant Attorney General
Office of Legal Counsel

Dec. 17, 1976

Mr. Bruce H. Hasenkamp
Director
President's Commission on White House
Fellowships
Washington, D.C. 20415

Dear Mr. Hasenkamp:

This is in response to your request for our views regarding the propriety of a corporate employer's providing certain benefits to one of its employees who is serving as a White House Fellow. You state that "[a] series of 'yes' or 'no' answers, rather than a formal opinion, will . . . probably suit our needs". But in this area it is not useful to proceed in that way.

The relevant conflict of interest statute here is 18 U.S.C. § 209(a), which makes it unlawful for an officer or employee of the Executive Branch, of an independent agency of the United States, or of the District of Columbia to receive from a source other than the United States Government, salary, or any contribution to or supplementation of salary, "as compensation for" the payee's services to the United States. Violations are punishable by a fine of not more than $5,000 or imprisonment for not more than one year, or both.[1] However, 18 U.S.C. § 209(b) provides that subsection (a) does not prohibit a Federal officer or employee "from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." The validity of the various types of payments mentioned in your letter must be considered in light of these two subsections of 18 U.S.C. § 209.

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[1] The statute does permit such payments as are contributed out of the treasury of any State, county, or municipality.

Moving Expenses to and/or from Washington, D.C.

This office has taken the position in the past that reimbursement for actual moving expenses is not the type of payment to which the prohibition in 18 U.S.C. § 209(a) was intended to apply. We believe, however, that payment must be limited to reimbursement for actual expenses incurred as opposed to an established moving allowance which might permit the recipient to retain the amount by which the allowance exceeded his actual expenses.

2. Contributions to the employee's retirement or pension fund account.

Such contributions are expressly authorized by 18 U.S.C. § 209(b), but only if made pursuant to a "bona fide" plan maintained by the former employer. A pension or retirement plan would ordinarily be considered "bona fide" if it covers a relatively broad class of employees and if participants who work for the Federal Government are not accorded special treatment under it. Because subsection (b) refers to a Federal employee's "continuing to participate" in such a plan, the employee must have been a participant in the plan before he began his Government service. An *ad hoc* or *ad hominem* payment of pension and retirement benefits on behalf of a particular White House Fellow would not be covered by the exemption in subsection (b) and would be unlawful under subsection (a) if made as "compensation for" his service to the Federal Government. See answer to question 3, *infra*.

3. Granting of stock options.

The granting of a stock option to a person in Federal service or about to enter Federal service is prohibited by 18 U.S.C. § 209(a) if it is granted "as compensation for" his services to the Federal Government. Whether a given payment is made "as compensation for" Government service and therefore prohibited by section 209(a) depends on the intent of the parties to the particular transaction. For example, a stock option granted

solely in consideration of past services to the private employer without taking account of the anticipated future status or activity of the employee who has accepted a White House Fellowship would present no problem. However, conditioning the grant of the stock option upon the future status or activity of the employee as a White House Fellow suggests that the payment is, at least in part, consideration for his becoming a White House Fellow.

Because it is virtually impossible to ascribe a particular subjective intent to an entire category of payments, irrespective of the parties involved, this office's advisory opinions in section 209 matters must ordinarily be based upon the inferences which can reasonably be drawn from the circumstances surrounding the type of payment in question. In following this practice, we have stated that we will not as a rule give advisory approval to payments to present or prospective Federal employees if the payor has discretion to determine whether the payment should be made. In our opinion, the exercise of that discretion at a time when the payor is aware of the recipient's status as a Federal employee suggests the possibility of a sufficient connection between the status and the payment that the one may be "compensation for" the other. That is not to say, of course, that all discretionary payments necessarily violate 18 U.S.C. § 209(a)—as we have said, that depends on the intent of the parties; we simply are not in a position to state that every discretionary granting of a stock option or other payment would be lawful under 18 U.S.C. § 209(a).

A non-discretionary grant of a stock option pursuant to an established company plan while the recipient is a Federal employee would, however, appear to be lawful if the plan satisfies the test in 18 U.S.C. § 209(b) of being a "bona fide . . . employee welfare or benefit plan." It is true that section 209(b) does not expressly mention a stock option plan among those in which a Federal employee may continue to participate notwithstanding § 209(a). It does, however, mention profit-sharing and stock bonus plans, both of which are indistinguishable for present purposes from a plan by which a company grants stock

options as a fringe benefit designed to permit its employees to participate in the growth of the company. For this reason, it is our opinion that continuing participation in a bona fide stock option plan does fall within the boundaries of the exception in § 209(b) and would therefore be lawful.

4. Contributions to the employee's account under a corporate savings and/or thrift plan.

Like stock option plans, corporate savings and thrift plans are not expressly mentioned in 18 U.S.C. § 209(b). But again, assuming that such a plan is "bona fide" for present purposes—i.e., one that covers a relatively broad class of employees and does not give special treatment to Federal employees—and that it can reasonably be characterized as an "employee welfare or benefit plan maintained by a former employer," we see no reason why such contributions would not ordinarily be lawful by virtue of the exception in 18 U.S.C. § 209(b).

5. Health, life, disability, and other insurance premiums.

Continued participation in bona fide insurance plans is expressly authorized by 18 U.S.C. § 209(b). Payment of insurance premiums on an *ad hoc* basis, independently of any company-maintained plan, would not be authorized under that provision.

6. Salary differential between one's salary as a Fellow and a higher corporate salary.

Payment of the salary differential would clearly constitute a "supplementation of salary" prohibited by 18 U.S.C. § 209(a). *See* R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137-38 (1963).

7. Rent for the employee's house back home, in the event the employee is unable to lease it during his/her year in Washington.

We have not previously expressed a formal opinion regarding this type of rent-guarantee arrangement. To be sure, such an ar-

rangement can be of financial benefit to a White House Fellow, and it might therefore be thought to be prohibited by 18 U.S.C. § 209(a) if that provision is to be applied strictly. However, payment by the company of rent for the employee's house incident to his moving to Washington or another location for the period of his White House Fellowship is in reality little different than the payment of the actual expenses of moving to the new location—expenses which we have previously stated may be paid to a person entering Government service under a special program such as this. For this reason, we believe that the company's arranging for the rental of the employee's home is permissible under 18 U.S.C. § 209(a). However, just as with moving expenses, there should be no opportunity for the employee to profit from the company's renting of his house. Rental payments should be calculated on the basis of a reasonable assessment of the rental market in the community where the house is located.

8. Can the company count the Fellowship year toward the number of years required for the vesting of a pension plan, the accrual of increased annual vacation, or the like?

Counting the Fellowship year toward the number of years required for the vesting of a pension plan would appear to be but one aspect of the employee's "continuing to participate" in the pension plan, which is permitted under 18 U.S.C. § 209(b). Counting the Fellowship year toward the accrual of increased annual vacation presents a somewhat more difficult problem. We do not believe that it would ordinarily be appropriate for a company to grant the employee several weeks of paid vacation time (or pay in lieu of vacation) on the theory that this benefit was "earned" during the Fellowship year. The granting of either would appear to constitute a supplementation of salary under 18 U.S.C. § 209(a). But counting the Fellowship year as a year of service with the company which may result in increased vacation time in *future* years bears a far more attenuated relationship to the Federal service. Vacation time is primarily earned in the year in which the individual renders services to the company.

Reference to prior years is usually made only to determine the amount of vacation time for which the individual is eligible. Assuming that the vacation entitlement is calculated according to an established and reasonable company policy, it is our view that counting the Fellowship year as a year of service to the company for this purpose is sufficiently far removed in purpose and effect from the type of payments sought to be prohibited by 18 U.S.C. § 209(a) that it would not be regarded as "compensation for" the Federal service within the meaning of that section.[2] In this connection, it should be noted that 18 U.S.C. § 209(b) does not prohibit a Federal officer or employee from retaining his status as a partner or employee of a private organization. If a White House Fellow takes a leave of absence from his previous position, accrual of seniority for vacation and similar purposes may be viewed as an incident of his being a partner or employee in the private organization (albeit in an inactive status) rather than an incident of Federal service. The same rationale would appear to apply where the Fellow resigns his prior position with the understanding that he will resume employment with his prior employer after the Fellowship year, since the break in the relationship with the prior employer in such a case is incomplete for conflict of interest purposes. *Cf.* 18 U.S.C. § 208(a).

You raised some further questions in your memorandum in addition to those regarding the specific types of payments just discussed. First, you asked whether a Fellow may continue his or her own contributions to insurance, savings or thrift, and pension plans maintained by a former employer, whether or not the employer contribution is proper. We have some doubt that

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[2] It might even be argued that a company's vacation policy could be regarded as an "employee welfare or benefit plan maintained by a former employer" in which a Federal officer or employee is permitted to participate under 18 U.S.C. § 209(b), at least to the limited extent of continuing to accrue seniority under that policy for purposes of future vacation years. We need not rest on that ground, however, in view of the position taken in the text, although this argument does tend to support our conclusion that counting the Fellowship year for increased annual vacation is not the sort of conduct to which 18 U.S.C. § 209, taken as a whole, is directed.

18 U.S.C. § 209(a) would prohibit contributions made by the Fellow, but in any event the Fellow's contributions would appear to be permitted under 18 U.S.C. § 209(b) as one aspect of "continuing to participate" in the plan.

Second you asked whether a White House Fellow could exercise a previously granted stock option during his or her Fellowship year. In our view, if the stock option was previously granted with no view to the recipient's Federal service, 18 U.S.C. § 209 would not prohibit the Fellow from exercising the option during the Fellowship year. *See* R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1141 & n. 93 (1963). The transfer of value ordinarily occurs when the option is granted, not when it is excercised, so the exercise of the option does not give rise to an occasion for the supplementation of the recipient's Federal salary. On the other hand, if the option was originally granted with a view to the Fellow's Federal service, the grant itself would raise a question under 18 U.S.C. § 209(a), regardless of when the option is exercised. *See* answer to question 3, *supra*.

Finally, you asked whether a White House Fellow may retain a position as an officer or director of his or her corporation, or a subsidiary thereof, either on active or inactive ("on leave") status. As we have indicated earlier in this letter, 18 U.S.C. § 209 in itself does not prohibit a Federal officer or employee from holding a position with an outside company or organization. However, the general counsel of the agency to which the Fellow is assigned should be consulted to determine whether the holding of a position in the particular company raises any problems under specific laws or regulations applicable to that agency.

We have one final point. Although 18 U.S.C. § 209 does not require a Fellow to withdraw from pension, insurance, and similar plans maintained by his former employer or to resign from his positions with the former employer, 18 U.S.C. § 208(a) does prohibit the Fellow from participating personally and substantially in any particular matter in which the company which maintains such a plan or with which the Fellow has any

arrangement concerning prospective employment has a financial interest.

I should also stress that the views expressed in this letter are in the nature of general advice and do not constitute a definitive opinion of this office with respect to the widely varying factual situations that may arise.

Sincerely,

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Sept. 15, 1977

Dear * * *:

You have asked for the opinion of the Office of Legal Counsel regarding the legality of a payment in the amount of $7800 which your previous employer, * * *, is considering making to you. For the reasons that follow, we advise you to decline the payment.

The proposed payment is in the nature of a severance payment or termination allowance. It may be useful to explain the law applicable to such payments generally before analyzing the specific factors bearing on the legality of the proposed payment here.

The pertinent conflict of interest statute in this situation is 18 U.S.C. § 209(a), which prohibits the payment or receipt of "any salary, or any contribution to or supplementation of salary, as compensation for" the recipient's services to the Federal Government. The penalty for a violation is a fine of not more than $5,000 or imprisonment for not more than one year, or both.

A severance payment made solely in consideration of past service to a private employer, even if made when the recipient is a government officer or employee, is not prohibited by section 209(a). A payment made wholly or partly as compensation for

the government service is a violation. Obviously, the issue turns on the subjective intent of the parties. 41 Op. A.G. 217, 221 (1955). And because the intent of the parties is crucial, advisory opinions relating to section 209(a) must ordinarily be based upon the inferences which can reasonably be drawn from the circumstances surrounding the payment.

It is important to note that the prohibition in section 209(a) applies even where the payor has no business before the agency in which the recipient serves. R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1137 (1963). Thus, a violation does not depend on the existence of a conflict of interest in the sense that there must be an identifiable corrupting potential inhering in the payment. It is sufficient that the parties intend the payment as a supplementation of Federal salary, whatever the underlying motivation may be.[1]

We have previously interpreted the phrase "as compensation for" in section 209(a) to embrace at least those situations in which Federal service is "consideration" for the payment in the classic contract sense—i.e., where the nature of the Federal work to be performed is the inducement for the payment, the quid pro quo. Applying this rationale, we on one occasion declined to give advisory approval to a severance payment made pursuant to plan under which a departing employee was eligible only if he entered a key Federal position.

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[1] In describing the rationale for the broad reach of what is now section 209(a), one study stated:

> The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration.

Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 211-12 (1960).

Moreover, even where the granting of a severance payment is not expressly conditioned upon a particular future status or activity, a payment made under a plan which grants the employer complete discretion to determine whether a departing employee will receive a severance payment and allows for the exercise of that discretion at a time when the employer may take into account the future status or activity of the departing employee also suggests the possibility of a sufficient connection between the future status or activity and the payment to support the conclusion that the one is "compensation for" the other.

Because of this possibility, and because of the inability of the Office of Legal Counsel to conduct a thorough factual investigation of the parties' actual intent in particular cases, we will not ordinarily give advisory approval to severance payments which are specifically conditioned upon Federal employment or which involve discretion which permits the employer to take the future status or activity of the departing employee into account. This policy rests not on the conclusion that all such payments would necessarily violate the statute, but rather on the assessment that the external circumstances are not sufficiently probative of their validity.

The $7800 payment * * * proposes to make to you is not made pursuant to an established severance pay plan. * * * has a plan providing for termination allowances under some circumstances, but it does not provide for a payment in the case of a voluntary resignation. The proposed payment here was authorized by a special resolution of the Board of Directors.

The minutes of the Board meeting relating to the payment, a copy of which was forwarded to us by * * *, states that the President informed the Board that you were being considered for an appointment to the * * * and that while your resignation from the company for this purpose was worthy of praise, it would nevertheless be a significant loss to the company. Accordingly, he recommended that the Board award you a "suitable honorarium . . . as a recognition of [your] outstanding services to * * *." The Board then adopted the following resolution:

> "RESOLVED, That the Board notes with regret the anticipated resignation of * * * from the Company's employ-

ment, and, therefore, in recognition of the esteem of her associates and in appreciation for * * * years of faithful service and valued contributions to the business of * * *, there is hereby awarded the sum of $7,800 as an honorarium payable from operating funds to * * * upon * * * resignation for the purpose of accepting appointment to the service of the United States should such resignation be required during the year 1977."

There is no established severance pay plan here under which eligibility is expressly conditioned on the acceptance of a key position with the Federal Government, as was true in the earlier case considered by this office, discussed above. But the specific Board resolution here contains the same defect, in that the honorarium was to be payable only upon your resignation "for the purpose of accepting appointment to the service of the United States." This strongly suggests that your Federal service was the inducement or consideration for the payment. Even if this language is not read as expressly conditioning the payment on Federal service, it is clear that the proposed payment is wholly discretionary and that the Board exercised its discretion with your acceptance of your present position principally if not exclusively in mind. As mentioned above, a discretionary payment of this type alone suggests the possibility of a sufficient connection between your Federal service and the payment that the one is intended as "compensation for" the other.

We have previously suggested that we would consider giving advisory approval to a severance payment made under a plan that conditions eligibility on a broader range of subsequent activities which includes Federal service if the employer does not retain discretion to reward particular activities. But in the present case, * * * informed us that a search of * * * files did not reveal even an informal policy of making severance payments to persons who voluntarily leave the company for other reasons. Nor was * * * able to give any assurance that the company would do so if such a case arose in the future. *Compare* Perkins, *supra,* 76 Harv. L. Rev. at 1137. This reinforces the inference

that you would not have been offered a payment but for your position in the Federal Government.

There are a few factors present here which differ somewhat from those involved in earlier severance pay situations considered by this office, but we do not believe they present the kind of special circumstances which would permit us to give advisory approval to the payment despite the nexus between the payment and your present position.

In severance pay proposals recently considered by this office, it has been the case that the payor was regulated by, had business before, or might otherwise have been in a position to benefit from the services the recipient would render to the Federal Government. This factor has been thought to indicate a motive for the company to make the payment and therefore be probative of an intent to supplement the Federal salary as compensation for the services. 41 Op. A.G. 217, 220 (1955). Here, it does not appear that * * * is significantly affected by * * * matters, except to the degree that the regulatory philosophy of * * * might have some spill-over effect on the regulatory philosophy of other Federal agencies, including the * * *[2] However, the interest of the payor in agency matters is at most probative of prohibited intent; as we have already noted, the prohibition in 18 U.S.C. § 209(a) applies even where the payor has no dealings with the recipient's agency. Here, the connection between the payment and your Federal service is close even in the absence of this additional factor.

Similarly, in some previous situations we have considered, the recipient took a cut in salary in going to work for the Government. An inference could therefore be drawn that the severance payment was intended to supplement the lower Federal salary in order to enable the individual to maintain his previous standard of living. Again, however, the lower Federal salary is not an element of the offense, but only a factor that has been taken into account in the past. Its absence is by no means decisive.

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[2] We note in this regard that you have specialized in the area of regulatory theory and pricing. Personal evaluations made available to us by * * * indicate that your work in this area has been relevant to * * * concerns in the past

Also, in the present case, the amount of the payment was calculated to equal the amount of three years' worth of • • • contribution to a stock savings plan that you will be required to forego because you are voluntarily leaving the company and the amount of taxes estimated to be due because you are realizing those contributions at the present time. As • • • points out in his letter of August 5 to Mr. Ulman of this office, the three years' of • • • contributions you must otherwise forego were themselves a reflection of past salary, service and performance. However, you are not entitled under the company plan to receive an amount equal to the company's contributions over the last three years. As • • • recognizes in his August 5 letter, the amount of the payment could have been calculated on some other basis or on no basis at all, and the amount and formula of the payment were therefore essentially a matter of judgment.[3] The important point for purposes of 18 U.S.C. § 209(a) is that you have no entitlement to a severance payment.

Finally, we note that while the amount of the proposed payment here is considerably less than that involved in a number of other severance payment situations, the amount of the payment is irrelevant in considering the application of 18 U.S.C. § 209(a).

For the reasons given, we must advise you to decline the proposed payment.

Sincerely,

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] • • • informed us, for example, that some consideration was given to basing the payment on the amount you would have received had you left involuntarily and therefore been eligible for a termination payment under the company's General Executive Instruction 5.1-3. Apparently, this higher amount ($30,613) was rejected because it might raise a question of appearances under the present circumstances.

APPENDIX C

Opinions of the Office of Government Ethics

Opinion 81 x 16

Letter to a private attorney dated July 31, 1981

By letter dated July 13, 1981, you have asked the Office of Government Ethics whether a proposed severance payment to a partner of [a large company] would be violative of 18 U.S.C. § 209. President Reagan has announced his intention to nominate (this individual) [to a position requiring the advice and consent of the Senate. ("the nominee")].*

You have informed us that the proposed severance payment by [the Company] to [the nominee] would be made pursuant to the [Company's] written Severance Pay Plan which you previously sent to us on April 30, 1981. On May 8, 1981, we sent to you a letter conditionally approving that Severance Pay Plan for purposes of 18 U.S.C. § 209 subject to certain provisos. The essence of those provisos were that "[w]e must be satisfied as to each payment under the [company's] Plan that partners going into 'public service' are in fact being compensated for past service to [the Company] (not as consideration for future activity or benefit to that company) and that entry into 'public service' is not always synonymous with entry into the federal service." (The quote is from OGE's May 8, 1981 letter to you.)

We find that the representations in your July 13, 1981 letter to us satisfy the provisos mentioned above in regard to [the nominee]. Rather than repeat those representations, we incorporate them herein by reference thereto. In brief, you have stated that [the nominee], with over twenty years of service as a key partner with [the Company], would be entitled under the Plan to a severance payment equal to one year's income as a partner (currently estimated at $200,000 to $250,000). The sever-

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* The Department of Justice and the Office of Government Ethics have previously ruled in October 1979 that the [person holding the position to which he was nominated] and other offices and employees of the [the Office headed by this person] are subject to 18 U.S.C. §§ 207, 208, and 209, even though [the Office] is an "independent establishment" in the legislative branch.

ance payment by [the Company] would be awarded to recognize his past distinguished service to the firm and is similar to prior awards to [one partner] (equivalent to 10 months of income as a partner) and to [another partner] (equivalent to one year's income as a partner). Significantly, the severance payments to [these two former partners] were awarded when one was leaving [the Company] to go to an academic position and the other to a private organization (neither a part of the federal service). While these payments to [these two former partners] were made prior to the adoption of this 1981 written Severance Plan, we understand them to be made in the same manner as in the proposed payment under the Plan to [the nominee]. Finally, you have informed us that according to your research [the nominee] is the only partner [of the Company] who has previously (in 1967) resigned to enter employment with the Federal Government since World War II.

We therefore determine that based on the representations in your letter of July 13, 1981, the conditions stated in our May 8, 1981 letter to you are satisfied and that [Company's] intent to make this severance payment is a good faith effort to compensate [the nominee's] past service to [the Company] and not as consideration for any prospective federal government service.

Sincerely,

J. Jackson Walter
Director

Opinion 85 x 11

Memo to an Agency Ethics Offjcial dated August 23, 1985

You have asked us to advise you regarding the application of 18 U.S.C. § 209(a) to a severance arrangement involving a prospective nominee to a Senate confirmed position.

From available information, it appears that the prospective nominee will resign his position as Chairman of the Board of a closely held corporation in which he is a major shareholder. He will retain his membership on the board on an uncompensated basis during his term of Federal appointment. He intends to return to his position as chairman of the corporation after he leaves Government service. He will retain his present vested interests in the corporation's ongoing profit sharing plan, pension plan and Supplemental Employees' Retirement Plan. He expects to continue his participation, on a reimbursement basis, in the corporation's group health and group life insurance plans.

In addition to the benefits described above, [the company] is considering the adoption of a severance benefits plan to provide payment to certain officers of the corporation, as designated by the discretion of the board of directors, who are leaving the company to perform public service, which would include service to local, state and Federal government, educational institutions, and charitable foundations. The proposed plan would pay the departing officer for past services an amount determined by the board of directors of up to 150% of the annual salary being received by the executive at the time of termination of employment, with the percentage of salary for a particular executive determined by (1) various factors, including years of service to the company, degree of responsibility for company affairs, and overall contribution to the success of the company over the period of employment, and (2) the costs of professional services incurred by the executive in connection with obtaining such position.

In applying this severance benefits policy to [this individual], it is anticipated that the board will approve a payment of 150% of his present salary of [x] for a total of [y], based on his [35 +]

years of service to the corporation and the large part he has played in developing the company to its present healthy financial condition and highly recognized stature in the publishing field. This benefit would be paid one half on January 1, 1986 and one half on January 1, 1987.

Although the issue is not without some doubt, for the reasons discussed below, we are of the opinion that 18 U.S.C. § 209(a) would preclude implementation of the proposed severance arrangement in [this individual's] case.

18 U.S.C. § 209(a) has four elements. It prohibits: (1) an officer of the executive branch or an independent agency of the United States Government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States.

In most cases, the first three elements are relatively straightforward, and the focus of the section is whether a payment is "compensation for services as an employee of the United States." Violations in matters involving severance payments depend to a large extent on the subjective intent of the parties. Consequently, our decision is based upon the inferences which can reasonably be drawn from all the circumstances surrounding the proposed arrangement.

In our review of the proposed arrangement we have taken into consideration such factors as the majority shareholder status of the proposed recipient, his intent to return to this former position as chairman of the board of the company upon termination of Federal service, his continued presence on the board as an uncompensated director, and finally, the lack of a pre-existing established corporate plan or policy involving severance payments.

In the past, we have given advisory approval to severance payments made under a prospective plan that conditioned eligibility on a broad range of activities, including Federal service. However, we have never granted approval to a prospective plan where the recipient indicated his intention *of* returning to the company upon termination of Federal service. In spite of the proposed language of the arrangement, the inference can be

drawn that availing oneself to the several available benefit plans of the company coupled with an intent to return creates, in effect, a leave of absence situation where the severance arrangement is used simply to supplement Federal salary. A true severance payment would occur at the end of [the individual's] service to the corporation. Since he will continue to serve in a limited capacity while he is in the Government and intends to return to full time status after Government service, that time has not yet occurred.

Additionally, the approval of such an arrangement could conceivably affect adversely the confidence of the public in the integrity of the Government's decisionmaking process by creating the appearance of official governmental acquiescence in an arrangement created specifically to circumvent the limitations placed on Federal salary. Violations of section 209(a) do not depend on the existence of a conflict of interest in the sense that there must be an identifiable corrupting potential inhering in the payment. It is sufficient that the parties intend the payment as a supplementation of Federal salary, whatever the underlying motivation may be. In describing the rationale for the broad reach of section 209(a), the Association of the Bar of the City of New York in their book, *Conflict of Interest and Federal Service* at page 211-12 (1960), stated:

> The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government; and in part the rule is grounded in consideration of personnel administration.

For the reasons given, we must advise you to reject the proposed severance arrangement.

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REPLY

BRIEF

Supreme Court, U.S.
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No. 88-931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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REPLY BRIEF OF LAWRENCE H. CRANDON, *ET AL.*

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Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-931

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY, and HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF LAWRENCE H. CRANDON, *ET AL.*

I. SECTION 209 DOES NOT APPLY.

1. As this Court has recently reaffirmed, Congress's intent is "best determined by [looking to] the statutory language that it chooses." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985); *see United States v. Monsanto*, ___ U.S. ___ (No. 88-454) (57 U.S.L.W. 4826, 4828) (June 22, 1989). "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Department of Treasury*, ___ U.S. ___ (No. 87-1020) (57 U.S.L.W. 4389, 4390 n.3) (Mar. 28, 1989).

The language of Section 209(a) is unambiguous. The statute imposes criminal liability when a non-government source makes a payment "as compensation for [the recipient's] services as an *officer or employee* of the executive branch." In creating criminal liability for the payor, the statute *only* criminalizes the act of "[w]hoever . . . *pays*,

or makes any contribution *to*, or in any way supplements the salary *of*, any such *officer or employee* under circumstances which would make its receipt a violation of this subsection" (emphasis added). The paragraph defining the payor's offense clearly reaches *only* payments *to* incumbent federal "officers or employees." The Solicitor General, in effect, urges this Court to amend the statute to add the term "*or prospective officers or employees*," but that invitation to enlarge the coverage of a criminal statute may only be made to Congress.

Since, as the government concedes, Congress intended that the scope of coverage of the acts of payors and recipients should "conform" under Section 209 (Gov. Br. 25-26), this Court need look no further to construe the statue. It applies only to payments made to *incumbent* federal officers or employees.[1]

The government attempts to avoid the plain language of Section 209(a) by making a convoluted discourse on the "location of commas" and the use of disjunctives rather than conjunctives. Gov. Br. 25. This effort to avoid the specific and limited focus of Section 209(a) goes beyond the bounds of fair interpretation of a criminal statute and contradicts this Court's well established principle that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *United States v. Bass*, 404 U.S. 336, 347 (1971) (citations omitted).

2. In contrast to Section 209, Congress included language in at least five other sections of the ethics law that explicitly prohibits persons from making or receiving various kinds of payments *before* the recipients become federal employees or officers, including the prohibition on pre-

[1] Underscoring the precise focus of Section 209(a) only on incumbent federal employees, the exceptions that Congress added from time to time in subsections (b)-(f) define the kinds of external supplements that federal employees may properly receive *while* employed by the government.

employment bribery in Section 201.[2] As this Court recently reiterated, the presence of specific language in one statute but not in another (when the statutes have been enacted simultaneously) "indicates to us that Congress understood what it was doing." *Monsanto*, 57 U.S.L.W. at 4829.

3. The government relies on law review articles and proposals issued years before the statute's enactment, but this kind of material is far removed from the concurrent committee reports and congressional debates that the Court sometimes finds adequately reliable in discerning congressional intent. In asserting that Congress must have intended a change in phrasing to make Section 209 applicable to unconditional severance payments received *before* entry into government service, the government ignores the *only* congressional explanation regarding changes in Section 209. Both contemporaneous committee reports explain *only* that Congress was slightly revising former Section 1914 in order to *narrow*, not expand, the statutory scope. S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News, 3852, 3863; H.R. Rep. No. 748, 87th Cong., 1st Sess. at 24-25 (1961).

It is clear that the predecessor to Section 209 (former 18 U.S.C. § 1914) did not apply to payments made before entry into government service.[3] There is absolutely no ref-

[2] Section 201 applies to a "person selected to be a public official," a term that is carefully defined and would not include petitioners; Section 203 applies to "Members of Congress Elect" and "Resident Commissioners Elect," and prohibits payments for services "to be rendered at a time when the person is" a government officer or employee; Section 204 covers Members of Congress Elect; Sections 210 and 211 cover payments made in connection with obtaining or soliciting future government employment.

[3] The government now suggests for the first time (Gov. Br. 26-27) that former Section 1914 may have prohibited pre-employment severance payments. Barely five months ago, however,

erence in the legislative history that Congress intended to expand the statute to cover such payments. To the contrary, Attorney General Kennedy's contemporaneous interpretation of the statute in 1962 confirmed that Section 209 "uses much of the language of former 18 U.S.C. § 1914 and does not vary from that statute in substance" and "prevents an officer or employee of the executive branch . . . from receiving" salary compensation from a private source. Pet. Br. App. 47a-48a. Incredibly, the Solicitor General, in asserting an allegedly "longstanding position" to the contrary based on internal OLC opinions that began in 1974 (Gov. Br. 30-31 n.27), ignores OLC's explicit acknowledgement in 1976 that Attorney General Kennedy was right: "Despite certain differences in language between the two provisions, the legislative history

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the Solicitor General conceded to this Court that former Section 1914 "applied *only* to persons who accepted payments while 'being a Government official or employee.'" Opp. to Cert. Pet. at 14 (emphasis added). The Solicitor General then argued that the law was changed to eliminate Section 1914's "loophole that failed to prohibit 'pre-Government-employment agreements to receive compensation.'" *Id.* (citations omitted). The government's taking a position totally at odds with its position of five months earlier is typical of the Justice Department's continuing inability to conceptualize a consistent approach to applying this criminal statute.

In any event, none of the government's cited authorities support its contention. The pre-1962 unpublished and otherwise inaccessible memorandum—which Roswell Perkins provided to us from his 25 year old files—simply comments that "what Section 1914 prohibits are benefits which *continue* to be derived by a Government official from a *former* private employer." Memorandum at 3 (emphasis added). The New York City Bar Association Report acknowledged that former Section 1914 was limited to payments made by "an outside party" to "a government employee." Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* at 211 (1960) (hereafter "N.Y.C. Bar Ass'n Rep.").

of § 209(a) reflects that its meaning was not intended to vary in substance from that of § 1914." Gov. Br. App. 25a.[4]

4. The government, like the Fourth Circuit, reads too much into Congress' deletion of the phrase "being a Government official or employee," which had appeared in the predecessor to Section 209, former Section 1914. Gov. Br. 26-29; *see* Pet. Br. 19-26. The only support that the government can muster for its position is the fact that in 1962 Congress deleted a somewhat similar phrase from *another* provision—former 18 U.S.C. § 281, now 18 U.S.C. § 203—and that other provision was to reach certain payments made outside the term of official employment. What the government fails to point out, however, is that—unlike in Section 209—Congress amended that other statute so that it would *expressly* cover payments made prior to the

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[4] These OLC opinions post-date the enactment of Section 209 by 12 years or more and the enactment of former Section 1914 by 60 years or more. The government can point to no executive, judicial or legislative opinion in those prior 60 years that either former Section 1914 or Section 209 was intended to cover pre-employment severance payments. Indeed, as late as 1976, OLC acknowledged that the government was "unaware" of "any official published interpretive material dealing with the present issue of severance payments." Gov. Br. App. 25a.

Moreover, the OLC opinions are hardly models of consistency. For example, while now assuring the Court that it was "clearly illegal" under Section 209 to pay moving expenses of persons entering federal service, OLC advised the White House in 1976 that this was "not the type of payment to which the prohibition in 18 U.S.C. § 209(a) was intended to apply" (Gov. Br. App. 38a), but two years later "[u]pon reexamination" decided that "we no longer believe the policy of paying all moving expenses conforms to the intent of § 209." Gov. Br. App. 4a. Then in 1981, OLC backtracked again and held that "payment of your moving expenses would not be compensation for your federal employment in contravention of § 209." Gov. Br. App. 11a.

recipient's entry into federal service. To reach pre-employment payments under the revised Section 203, Congress extended coverage to "Member[s] of Congress Elect" and "Resident Commissioner[s] Elect," and outlawed payments for official services "*to be rendered* at a time when the person . . . is" a government employee (emphasis added). The fact that Congress did not add any similar language to Section 209 is dispositive: Congress evidently decided that recodified Section 209 should continue to apply only to payments to *incumbent* federal employees.

Indeed, Congress was aware of exactly what it was doing. While the House Report noted that "section 203 would *broaden* the prohibitions of [former] section 281 [and] the class of persons affected,"-H.R. Rep. at 20 (emphasis added), the Report's discussion of Section 209 speaks only of *narrowing* "vague" and "indefinitely broad" language and otherwise notes that Section 209 "varies only to a minor extent in its substantive prohibitions" from former Section 1914. *Id.* at 24, 25.[5]

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[5] The government suggests that the House Report states that the mere deletion of the phrase "being . . . an officer or employee" would reach "services to be rendered." Gov. Br. 28. In fact, the House Report simply paraphrases the unambiguous language of Section 203 to that effect, and does not even discuss the deletion of the phrase on which the government relies.

These changes were consistent with the recommendations of the earlier 1958 House subcommittee staff report. The House staff expressed the desire to expand the predecessor to Section 203 (former 18 U.S.C. § 281) to cover certain payments made outside the formal scope of government service. It proposed to do so by amending the statute expressly to cover members-elect of congress and "services rendered or to be rendered at a time when he is . . . an officer, agent, or employee of the United States," explaining that the proposed changes were intended "to provide that violation shall turn on the recipient's status at the time of actual or purported rendition of services, rather than

5. It is also curious that the government cites only the legislative explanation of the deletion from former Section 281 of the phrase "being . . . an officer or employee of the United States", but ignores legislative history that explains the deletion from former Section 1914. The House subcommittee staff report on which the Government so heavily relies explains precisely why it proposed deleting the language "being a Government official or employee" from Section 1914. That phrase created an ambiguity about whether the statute applied beyond employees of the *executive* branch:

> "It is not entirely clear whether its present application to 'Government official(s) and employee(s)' includes Members of or employees of Congress or the judiciary. . . ." Staff Rep. at 61.

According to the staff report, the proposed deletion of the phrase that limited coverage to incumbent employees of the *executive* branch was intended solely to "make clear that the section applies to legislative and judicial personnel." *Id.* at 62. Thus, the only explicit legislative history dealing with the proposal to drop the phrase "being a Government official or employee" from the successor to Section 1914 has nothing to do with reaching pre-employ-

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on his status at the time of agreement for or receipt of compensation." Staff of Subcomm. No. 5 of House Comm. on the Judiciary, *Federal Conflict of Interest Legislation* 44, 85th Cong., 2d Sess. 50-51 ¶ 7 (Comm. Print 1958) (hereafter "Staff Rep."). Clearly, the House staff did *not* view the mere deletion of the language "being . . . an employee" as sufficient to accomplish that purpose. Significantly, the House staff did not express similar concerns regarding pre- and post-employment payments in its discussion of former Section 1914, and did not propose amending that provision to cover such payments. Staff Rep. at 43-46.

ment payments to persons who are not yet employees of *any* branch of government.[6]

6. The government's reliance on the 1960 report of the Association of the Bar of the City of New York, *Conflict of Interest and Federal Service*, is similarly misplaced. The bar association report *proposed* amending former Section 1914 to cover certain payments made "to a government employee before he becomes a government employee or after he terminates his government employment, with the intention and purpose of compensating the employee for work done in Washington." *N.Y.C. Bar Ass'n Rep.* at 213. What the government conveniently ignores, however, is that the bar association's draft bill would have accomplished this proposed expansion in coverage by including the language "for or in consideration of personal services rendered *or to be rendered* to or for the United States." *Id.* (emphasis added). Congress, however, did not adopt the Bar Association proposal, and omitted the language that *would have* reached pre-government employment payments.[7]

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[6] Apparently at the suggestion of President Kennedy, Section 209 as enacted, like former Section 1914, remained limited to executive branch employees. *Compare* H.R. 8140, 87th Cong. 2d Sess (1961) (bill enacted); H.R. Doc. No. 145, 87th Cong., 1st Sess (1961) (President's transmittal message); H.R. 7139, 87th Cong., 1st Sess (1961) (Administration bill); *with* H.R. 3411, 87th Cong., 1st Sess (1961) (bill based on House staff report). The legislative history contains no explanation for Congress's ultimate decision not to include legislative and judicial branch personnel within the scope of Section 209.

[7] Professor Manning of the Yale Law School, who was staff director of the bar association report—and whom the government cites at least a half-dozen times (Gov. Br. 14-40)—subsequently wrote that only "[t]he regular full-time worker in a government department or bureau is subject to Section 1914 as a 'Government official or employee,'" and "Section 209 adds nothing to

7. Congress's rationale for maintaining this restricted coverage is plain. As even the government acknowledges (Gov. Br. 10), Congress was concerned in both Section 1914 and Section 209 solely with the "divided loyalty" of a federal employee who simultaneously receives compensation from a private source for performing his or her public duties. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. at 3 (1961); Pet. Br. at 22-24. *See also* Staff Rep. at 44. As the New York City Bar Association report explained:

> "The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule *prohibiting two payrolls and two paymasters for the same employee on the same job*. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers." *N.Y.C. Bar Ass'n Rep.*, at 211 (emphasis added). *See also* 33 Op. Att'y General 273, 275 (1922).

None of these concerns about "serving two masters" and "divided loyalty" exists when, as in this case, a citizen receives from his employer, before he enters federal service, an irrevocable, unconditional lump-sum payment "with no strings attached." The private employer retains no "hold" on the employee since it cannot threaten to "cut

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the meaning of the term 'Government officer or employee.'" B. Manning, *Federal Conflict of Interest Law* 151, 152 (1964). *Accord* Petrowitz, *Conflict of Interest in Federal Procurement*, 29 L. & Contemp. Prob. 196, 209 (1964) (cited in Gov. Br. at 21) (Section 209 "applies only to regular employees and officers of the executive branch and independent agencies.")

off one of the [federal] employee's economic lifelines." There is no *reasonable* basis for the public or colleagues to view with "suspicion and bitterness" a terminal payment that severs all financial ties with the private employer. And the pre-employment severance payment gives the federal employee no more reason "to favor his outside payor" than he would have as a result of any other kind of prior financial relationship with the former employer.

8. Not surprisingly, in light of the pervasive practice of making severance arrangements with persons entering federal service, the government concedes that severance payments do not necessarily violate Section 209. According to the government, the line of demarcation between ethical conduct and criminal behavior is the *employer's method of calculating* the severance payment. *See* Gov. Br. 4, 13, 19, 23 n.21, 28 n.24, 31-32 n.28. The government argues that Section 209 is violated when pre-employment severance payments are calculated with reference to future government salary. Gov. Br. 12-13. Applying this purported distinction, the government acknowledges that it has raised no objection to severance payments many times larger than the payments here. Gov. Br. 31-32 n.28. The government's distinction, however, makes no sense in dealing with the threat of "divided loyalty," since any tendency to feel special "gratitude" to the former employer, as well as any public perception of the payment, would more likely turn on the size of the payment than the method the employer uses to calculate it. The critical point is that when the payment is *irrevocably* made *before* the employee enters public service, the federal employee is not serving two masters.[8]

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[8] Similarly, there is not one word in the statute or the legislative history to support the government's contention that Section 209, as a matter of law, automatically outlaws payments "intended to induce" acceptance of federal employment. Gov. Br. 12. To the contrary, OLC accurately observed in 1974 that "[p]rior opinions of the Attorney General dealing with" the predecessor to Section 209 "suggest that mere cognizance of the lower government salary does not, per se contaminate an otherwise proper payment." In that opinion the Justice Department declined to investigate, as a possible violation of Section 209(a), a $90,000 lump sum severance payment made by a company to an employee resigning to take a government job, even though (1) the company only gave severance payments to employees who resigned to enter public service, (2) company officials stated that the payment was "based in part on the difference between [the employee's] income at the company and his new salary in the government," and (3) the company's express purpose was to "reduce the potential barrier to leaving [the company] by alleviating the economic hardship . . . ." Gov. Br. App. 13a-14a.

In another opinion, the Assistant Attorney General decided that OLC was "not in a position to advise categorically" that a proposed $84,000 payment would violate Section 209(a), even though it was to be made under a "plan entitled 'Service with the Federal Government,' " only applied if "the position which the employee undertakes in the federal service is 'a key position . . .';" and the "stated purpose of the plan" was to "encourage [the company's] employees, in appropriate cases, to undertake such federal service." Gov. Br. App. 22a-23a.

9. In an effort to side-step the inapplicability of Section 209 to pre-employment severance payments, the government asserts that "[e]ach of the individual petitioners had already either started federal employment or been sufficiently assured of his nomination or appointment at the time the payments were made." Gov. Br. 30 n.26. The government's current assertion contradicts its stipulation that petitioners received their severance payments *before* becoming federal employees and that they "had not secured, and were not guaranteed" their government positions at the time they received their payments. JA 26, ¶ 26; 28, ¶ 43; 29, ¶ 57; 31-32, ¶ 75; 33-34, ¶ 90. Based in part on that stipulation and the testimony of a government personnel expert (JA 588-607), the trial court found that "at the time Boeing made and the individual defendants

accepted the severance payments in question, the individuals were still employed by Boeing and had not yet entered into government service." Pet. App. 18a, ¶ 16.

Furthermore, the government's sly implication that Section 209 applied to Paisley and Kitson because they were "consultants" at the time (Gov. Br. 30, 2-3 n.2) is astounding. As the Solicitor General well knows, government consultants are "special Government employees" specifically *exempted* from any prohibitions of Section 209(a) by subsection (c). *See* 18 U.S.C. § 209(c). Thus, payments to consultants—*i.e.*, independent contractors still employed by Boeing—could not violate Section 209. *See* B. Manning, *supra*, at 155 ("The independent contractor lies beyond the reach of Section 1914 [now Section 209]").

10. The government largely ignores (Gov. Br. 33-34) petitioners' argument (Pet. Br. 28-32) that fundamental principles of agency law and federal employment law prohibit an action based on allegations that these severance payments violated the "fiduciary duty of undivided loyalty" that federal employees owe to their government employer. JA 13, ¶ 20; 15, ¶ 25; 16-17, ¶ 30; 18, ¶ 35; 20, ¶ 40. The government's "short answer is that Congress did not incorporate common-law principles of agency in Section 209." Gov. Br. 33. Once again, the government displays total confusion about its own case.

Since Section 209 does not create a civil cause of action, *the government alleged* that it was bringing its claim "under federal common law" based on an alleged breach of fiduciary loyalty (JA 7-21) and stated "Federal common law would apply" (JA 124). The government cannot have it both ways—relying on common law as a vehicle to get into court and then denying that law's impact once it has the court's attention.

This Court recently held that, "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." *Community For Creative Non-Violence v. Reid*, ___ U.S. ___ (No. 88-293) (57 U.S.L.W. 4607, 4609) (June 5, 1989). As the government conceded and the trial court found, none of the individual petitioners was an officer or employee of the United States at the time he received his severance payment. Pet. App. 17a-18a. *See* pp. 11-12, *supra*. The "conventional master-servant relationship" was between the individuals and Boeing—their employer at the time of these payments—not between the individuals and the federal government. *See Restatement (Second) of Agency* § 2 (1958). In the absence of an agency or employment relationship, there can be no fiduciary duty of undivided loyalty. *See id.* § 171 (1958); Pet. Br. 30-31. Congress did not change that principle when in Section 209 it defined a specific fiduciary duty that federal employees—but not mere candidates—would have.

II. THE TRIER OF FACT PROPERLY FOUND THE ABSENCE OF PROHIBITED INTENT.

1. The government continues to assert that a payment need not be specifically intended as compensation for services as a federal employee. According to the government, it suffices that a person make or receive payments with "the characteristics" of compensation for federal services. Gov. Br. 42. Both courts below rejected the government's proposed objective standard of liability and held that Section 209 requires a showing of "compensatory intent" (Pet. App. 7a, 24a-25a), but the government now tries to dress up its argument in the clothes of "*mens rea*." *See* Gov. Br. 41-43.

As the courts below recognized, however, the language of Section 209—which prohibits only payments made or received "as compensation for . . . services as an officer or employee of the United States"—compels the conclusion that a subjective intent to compensate or be compensated for performing federal service is a crucial element of the

offense.[9] *See Liparota v. United States*, 471 U.S. 419, 426 (1985). Even the government's citations (Gov. Br. 34-40) show that Congress always viewed intent as a necessary element of the offense. Indeed, until this case, the Justice Department consistently and *without exception* agreed that specific compensatory intent is a critical element under Section 209.[10]

2. The government does not dispute that the court of appeals, while overturning as purportedly "clearly erroneous" the trial court's finding that *Boeing* lacked compensatory intent, did not disturb or even address the trial court's separate finding that the individual petitioners also lacked such understanding or intent. The government seems to argue that the payments were unavoidably tainted because Boeing (a) had a policy of granting severance payments to employees who took federal positions but not

[9] The government's belabored exegesis (Gov. Br. 34-45) on the meaning of the phrase "as compensation for" is as wrong as it is long. As Professor Manning stated, "the change from 'in connection with' to 'for' is a step toward further specifying that the outside salary payments are not illegal unless *directly linked to the employee's governmental services*." B. Manning, *supra*, at 171 (emphasis added).

[10] OLC said in a 1976 opinion that the issue whether a payment is made as compensation for federal service "turns upon the intent of the parties", and can be resolved only by examination of "all surrounding facts and circumstances bearing upon intent." Gov. Br. App. 26a, 28a. *Accord* Gov. Br. App. 31a ("legality of a severance payment . . . turns on the intent of the parties in a particular case"); Gov. Br. App. 39a ("subjective intent" is the ultimate issue).

Moreover, because, as the government admitted (Gov. Br. Fourth Circuit dated July 22, 1987 at 16-18), severance payments are so common, elimination of a *mens rea* requirement in Section 209 would "criminalize a broad range of aparently innocent conduct." *Liparota*, 471 U.S. at 426. In such situations, the presumption in favor of *mens rea* is particularly strong. *See id.*

other jobs and (b) calculated the amount of the payments with reference to the difference between Boeing and federal salaries. Gov. Br. 13.[11] Even if this were true *as to Boeing*, however, Boeing's intent cannot be imputed to the individuals, since the government's separate claims against them necessarily require a showing that each of them acted illegally.

3. When one combs the government's brief for alleged evidence of the *individuals'* intent, the only evidence mentioned is the fact that they referred to salary and cost-of-living differentials in their calculations of the financial consequences of leaving Boeing. Gov. Br. 38. The government obscures the fact that the individuals *also* included other items, such as the loss of *accrued* and non-vested financial benefits associated with leaving the company in mid-career.[12] They testified that they never knew how

[11] In claiming that Boeing's consideration of the salary differential—among other factors—establishes compensatory intent as a matter of law, the government is implicitly disavowing prior, repeated advice by the Attorney General and OLC that neither Section 209 nor its predecessor created such a *per se* rule. *See* notes 8 and 10, *supra*.

[12] The government tries to minimize this fact by asserting that "accrued but unvested items represented a relatively small portion of the overall payment the individuals sought." Gov. Br. 5. The government is wrong. First, none of the petitioners "sought" particular amounts, but simply submitted, at Boeing's request, a comprehensive survey of all possible financial costs of prematurely terminating their employment. JA 26, ¶ 25; 27, ¶ 41; 29, ¶ 55; 31, ¶ 72; 33, ¶ 87. Second, the "accrued but unvested" items were not a "small portion" of those calculations, but in some cases were greater than the total amount of the severance payment actually received. For example, Paisley calculated over $345,000 in such accrued benefits, but received a payment of only $183,000. LE Ex. 11 at 2; JA 11. Similarly, Jones estimated that he would forfeit over $279,000 in accrued but unvested benefits, yet received only $132,000 in severance pay. LE Ex. 10 at 14; JA 11.

Boeing actually calculated the payments, and there is no basis to contradict this testimony. JA 47-48, ¶ 3; 188; 203-04; 492-94; 531-32. The trial judge had the opportunity to observe the demeanor of petitioners Jones and Paisley, who testified live at the trial. The trial court evaluated this and the other evidence, and found that the

> "severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing, [and were not] intended as compensation for government services rendered by those individuals."Pet. App. 20a, ¶ 25; 24a.

In addition, the government fails even to respond to petitioners' argument that the severance payments could not have been intended to compensate the defendants for their services as "employees or officers of the executive branch," since it was far from certain at the time the defendants received their unconditional, irrevocable payments that they would in fact end up working for the federal government or would ever perform *any* services as federal employees. As a result of the Reagan "hiring freeze," many candidates who were even further along in the recruiting process never entered federal service. It is entirely unwarranted to insist, as the government does, that Boeing and the individual defendants *must* have viewed the severance payments as "compensation" for work they might never perform for the federal government.

III. DISCLOSURE FORECLOSES ANY ACTIONABLE CLAIM FOR CIVIL RECOVERY.

1. Although the government concedes that disclosure of a potentially conflicting financial relationship bars recovery under common law principles, it claims that "[t]he standards that petitioners violated . . . are prescribed by an Act of Congress, not the Common Law . . . Congress may displace or expand upon the common law and it has done so

here." Gov. Br. 50. As we discussed earlier, however, this case is not brought under Section 209, which does not itself create a civil cause of action. Rather, as the government declared below, this is a civil claim "under common law" for "breach of duty of loyalty," and is controlled by federal common law principles. JA 7-21, 124. In order to recover for breach of fiduciary duty under the federal common law, it is necessary that the allegedly conflicting relationship be *undisclosed*. *See* Pet. Br. 32-34. The fact that Section 209 does not itself authorize a formal "waiver" of a conflict, therefore, is irrelevant.

2. For this reason, the government's reliance on *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), is misplaced. Gov. Br. 47-49. *Mississippi Valley* was a breach of contract action against the United States. As a defense, the government sought to avoid the contract on the ground that it had been entered into by a federal employee with an actual conflict of interest, in violation of former 18 U.S.C. § 434. In determining whether to excuse the government's nonperformance, the Court considered whether the employee's superiors had (or could have) waived the financial conflict, thereby ratifying the otherwise illegal contract and rendering it binding. The case did *not* involve a claim for damages for breach of fiduciary duty.

Moreover, *Mississippi Valley* and the other cases cited by the government all involved actual, inherent, irreducible conflicts of interest in which the government employee was self-dealing for his own pecuniary gain at the government's expense. Mere "disclosure" cannot alleviate a real conflict. In this case, by contrast, the government alleged that any conflict of interest was merely "potential." JA 123-24. In cases of mere potential or apparent conflict, the employer can take steps—such as recusal from dealings with the third party (as actually occurred here), or heightened supervision of any contacts—to avoid risk.

3. In alternatively contending that petitioners' disclosure was insufficient, the government has taken a remarkable position. According to the government, it was not enough for petitioners to disclose the fact and amount of their severance payments, as they did. *See* Gov. Br. 48. It also was necessary, the government says, that they disclose the method by which Boeing calculated the payments, even though, as the district court found, the individual petitioners did not know how Boeing made those calculations, and even though the government's very specific disclosure regulations instructed them to *aggregate* all payments from a single source on their financial disclosure forms. Pet. App. 19a-20a. This position conflicts with long recognized common law principles. *See, e.g., United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied* 454 U.S. 941 (1981).[13]

Moreover, the government does not dispute that, in contrast to the situation that existed in 1961, the Ethics in Government Act expressly authorizes various federal officials to investigate and waive potential conflicts of interest. Pet. Br. 35. In this case, the "designated agency ethics officers," who certified that there were no actual or potential conflicts, actually knew of the payments, but made no effort to learn from petitioners or Boeing how Boeing arrived at the payments—apparently satisfied that such an inquiry was not relevant. Petitioners also disclosed the payments to government superiors and lawyers, and were assured that their proposed or actual receipt was appropriate, without suggesting the need for further investigation. JA 47-48, 58, 67, 74.[14]

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[13] The government does not dispute that petitioners completed their SF 278 Forms in accordance with the government's own instructions—including the *requirement* that the employee aggregate all forms of earned and non-investment income that are derived from a single source. *See* 5 C.F.R. § 734.301.

[14] The government's objection to the use of affidavits from those government officials is baseless. The affidavits were before the trial court as exhibits to defendants' motion for summary judgment. In any event, citations to the affidavits are followed by citations to other evidence offered at trial. *See* Pet. Br. 32-34.

The common law rule about disclosure was meant to protect individuals from the grossly unfair result that the Justice Department seeks in this case, where the government conceded that there is *no* evidence of actual corruption or conflict of interest.[15] This is a case that never should have been brought, and there were ample grounds for the trial court to throw it out.

[15] The government now asserts that it did not "stipulate" that no actual conflict of interest occurred. Gov. Br. 46 n.40. In fact, while the government did not sign the formal pre-trial stipulation to that effect, the trial judge ordered government counsel to identify any of the proposed facts on which the government believed there was a triable issue, and counsel assured the court that "we are not going to contest this . . . ." JA 35, 140. Thus, the court took it as conceded that the indivdual petitioners "capably and honorably performed their public duties without bias and with independence and impartiality" and the district court so found. Pet. App. 19a, ¶ 23; JA 27, ¶ 33 (Jones); 28, ¶ 50 (Paisley); 30, ¶ 65 (Reynolds); 32-33, ¶ 84 (Kitson); 35, ¶ 101 (Crandon). *See also* Pet. App. 20a, ¶ 27 (petitioners disqualified themselves from Boeing-related matters).

Respectfully submitted,

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